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REPORTS
OF
CASES ARGUED AND ADJUDGED
IN THE
Court of Appeals of Maryland.

WM. H. PERKINS, JR.,

STATE REPORTER.

VOLUME 125.

**CONTAINING CASES IN OCTOBER TERM, 1914 AND
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SEP 9 1915

NAMES OF THE JUDGES, ETC.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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HON. NICHOLAS CHARLES BURKE, Associate Judge.
HON. WILLIAM H. THOMAS, Associate Judge.
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HON. JOHN PARRAN BRISCOE, Associate Judge.
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On page 89 for James M. *Muller*, one of the counsel for the appellant,
read *James Marfit Mullen*.

On page 248 for *Robinson* Griswold, read *Robertson* Griswold.

On page 471 in the first line of the fourth paragraph of the syllabus,
for active *negligence*, read *active vigilance*.

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MARYLAND REPORTS.

Beginning with the Concluding Cases of the October Term, 1914.

ALBERT C. CROWNFIELD

vs.

HOWARD M. PHILLIPS AND AMY G. PHILLIPS.

Partners: competing business; injunction to restrain. Injunctions: appeal; effect; discretion of court; Code, Article 5, section 29.

From the action of a court, under section 29, Article 5 of the Code, in refusing to direct that an appeal from its order granting an injunction shall not stay the operation of the decree, no appeal will lie. p. 3

Unless with the consent of the other partners, one partner can not carry on a business of the same nature and in competition with that of the firm. p. 3

A violation of this rule may be enjoined. p. 5

Decided January 12th, 1915.

Appeal from Circuit Court No. 2 of Baltimore City.
(AMBLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Geo. Moore Brady, for the appellant.

No appearance for the appellees.

CONSTABLE, J., delivered the opinion of the Court.

This appeal grows out of the refusal of the Court below to issue an injunction forthwith, upon a petition filed by Albert C. Crownfield, in the cause of *Howard M. Phillips and Amy G. Phillips v. Albert C. Crownfield*, 124 Md. 443.

The petition sets out the facts which were alleged in the bill and answer in the original proceedings, which need not be repeated here, since they are quite fully set forth in the opinion filed in that appeal; and in addition alleges that the complainants, after the dissolution of the injunction by the lower Court, took an appeal from the decree and filed an appeal bond, thereby staying the operation of the decree; and thus, have been enabled to keep in possession of the property in controversy for a great length of time, through their delay in prosecuting this appeal. It was further alleged that the complainants, after the decree adverse to them, and after this appeal from the same, leased a store-room on the same floor of the building in which the partnership business of the parties was carried on, and are therein conducting a business similar to, and in competition with, the partnership business.

The petition states the objects of the petition to be (first) to have the Court exercise the discretion granted to it by section 29 of Article 5 of the Code, and pass an order directing that the appeal shall not stay the operation of the

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decree; (secondly), that the complainants may be enjoined from carrying on the business they have opened, in competition with the partnership business.

The Court refused on the petition and affidavit to issue an order annulling the usual effect of an appeal, and also refused to grant a peremptory injunction, but passed an order directing the complainants to show cause. From said last mentioned order, this appeal was taken.

This Court has no power to review the refusal of the lower Court to annul the effect of the appeal, for it is a matter that is expressly left, by the statutes, to the discretion of the Court where the proceedings are pending. *Washington County v. School Commissioners*, 77 Md. 292. The only question presented to us for determination is whether the lower Court was correct in not ordering an injunction to issue immediately, but allowing the complainants time to show cause before acting upon the allegations.

The rule of law is universal, that a partner, without the consent of his co-partners, cannot carry on a business of the same nature and competing with that of the firm. If this rule is violated, equity may enjoin him from doing so; and some jurisdictions have held that he may be compelled to account and pay over to the firm all profits thus made. *Christian Grocery Co. v. Hill*, 122 Ala. 490; *Grafton v. Paine*, 7 App. Cases, 255; *Tichnor v. Newman*, 186 Ill. 264; *Metcalf v. Bradshaw*, 145 Ill. 124; *Lockwood v. Beckwith*, 6 Mich. 168; *American Bank Note Co. v. Edson*. 56 Baro. 84; *Marshall v. Johnson*, 33 Ga. 500; *Van Deusen v. Crispell*, 114 N. Y. App. Div. 361; *Manuf. Nat. Bank v. Cox*, 59 N. Y. 659. This rule is not only well established, but founded in reason.

If, then, the allegations were sufficiently definite, specific and verified by affidavit, we think such a case would be presented for immediate relief. To ascertain, let us examine in detail just what the allegations set forth, and, for this

purpose, we cannot do better than set out verbatim all references thereto. The first mention is as follows:

"The second object is to enjoin the complainants from carrying on a business which they have recently entered upon on North Charles street, adjoining and immediately to the north of the premises occupied by the aforementioned store, called 'The Lyric.' * * * That the appellants (Phillips) are conducting the Lyric apparently for the benefit of themselves and the defendant (petitioner), and, in an *adjoining* store on Charles street, they are conducting a *similar store on their own behalf*, thereby wilfully competing between themselves, on the one hand, and themselves and the defendant, on the other, the details of which are hereinafter set forth."

The details are then set out as follows:

"That in spite of their actual possession of 'The Lyric,' situate at the northeast corner of Charles and Preston streets, the complainants leased, during the summer, the rear of the first floor of the same building in which 'The Lyric' store is situate, and they have opened up there a tea room and delicatessen store. They have a lease from the same party from whom the complainants and the defendant have a lease. Their lease runs for five years, at forty dollars a month, and the lessees are the complainants, together with Ella W. Mitchell, the mother of the said Amy G. Phillips, and the bondswoman in the injunction bond and in the appeal bond. The two stores are in direct competition, and yet they are connected together in the same building by direct passageway. They both sell cigars, ice-cream, ginger ale, crackers, cake, etc. The complainants remove articles from one store to the other, so that it is practically impossible to keep an accounting. It is hard, from the street, to tell where one store begins and the other ends. The show windows of the stores are largely dressed alike,

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and the complainants go first from one store to the other, acting as salesmen in both. The stores are in competition, one, the tea room and delicatessen store, being owned by Howard M. Rhillips and the members of his family, and the other being run by said Howard M. Phillips and Amy G. Phillips, although, as decreed by Court, the property of the defendant."

It needs no further comment to show that according to the allegations of the petition, the complainants are violating flagrantly the above rule, and therefore the petitioner was entitled to immediate relief by way of a preliminary injunction. And we will, therefore, reverse the ruling of the lower Court and remand the cause so that an injunction can be issued by the lower Court.

*Order reversed and cause remanded, with costs
to the appellant.*

CREW LEVICK COMPANY

vs.

W. KEIFFER HULL. TRADING AS THE HAGERSTOWN
CITY GARAGE COMPANY.

*Infants: engaged in business; contracts; Article 56, section 39
of the Code.*

Article 56, section 39 of the Code, requiring minors to take out a license before engaging in certain kinds of business, does not render a minor liable on his contracts, made in the prosecution of such business, in which he is engaged without a license.

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Decided January 13th, 1915.

Appeal from the Circuit Court for Washington County.
(KEEDY, J.)

The facts are stated in the opinion of the Court.

The cause was submitted to BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

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Opinion of the Court.

J. O. Snyder and *Albert J. Long* submitted a brief for the appellant.

Wagaman & Wagaman submitted a brief for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The appellant sued the appellee, having in the *narr.* counts for goods sold and delivered by the plaintiff to the defendant, and for money found to be due from the defendant to the plaintiff on accounts stated between them. The defendant filed a plea that at the time of the making of the alleged contract and incurring the alleged indebtedness, he was within twenty-one years of age. The plaintiff filed a replication to that plea as follows:

"That the contract or contracts sued on in this case is a contract or contracts for the sale of gasoline by the plaintiff to the defendant, and at the time of the making of said contract or contracts for the sale of said gasoline as aforesaid, the said defendant was engaged in the selling, bartering and disposing of goods, chattels, wares and merchandise, and was required by the laws of the State of Maryland, for the purpose of prosecuting said business of selling, bartering and disposing of goods, chattels, wares and merchandise, as aforesaid, to take out a license such as is required by the laws of the State of Maryland for that purpose, and that said contract or contracts for the sale of said gasoline as aforesaid, were made in the prosecution of said business of selling, bartering and disposing of goods, chattels, wares and merchandise, as aforesaid."

The replication was demurred to and the demurrer sustained. The plaintiff having refused to file an additional replication, judgment of *non pros.* was entered.

The action of the lower Court was unquestionably correct. It cannot be doubted that at common law an infant was not bound on the contracts for the purchase of goods, wares and

merchandise purchased by him for the purpose of selling, bartering and disposing of them. Even if an infant become a partner he cannot be held for contracts of the firm, individually, unless he affirms or does that which amounts to an affirmance, after he attains his majority. *Bush v. Linthicum*, 59 Md. 344. In that case Thomas J. Linthicum, an adult, entered into a written agreement of partnership with Richard H. Weir, an infant, by which they agreed to become co-partners in the business of a retail grocery and provision store. JUDGE MILLER, whose opinion in the lower Court was adopted by this Court, said: "I concede that the law casts its protection and guardianship around infants, as to all their contracts, except those for necessities, and that it is not competent for the Court in this case to pass any decree, which will impose any personal liability upon the infant defendant for the debts of this firm, or enforce upon him any of the terms or conditions of this partnership contract, or even compel him to pay any of the costs of these proceedings." The Court did, however, hold that it was competent to decree a dissolution of the partnership and to wind up its affairs through the medium of a receiver,—that is, to collect the debts due the firm, sell its assets and apply the same to the payment of the debts. As to the general rule of the exemption of an infant from contracts except for necessities, see also *Brawner v. Franklin*, 4 Gill, 463; *Mon. Bg. Assn. v. Herman*, 33 Md. 128; *Brantly on Contracts* (2nd Ed.) 145-147; 16 *Am. & Eng. Ency. of Law*, 282, and 22 *Cyc.* 580. But as there can be no question about the general rule at common law, it is perhaps useless to cite authorities.

Inasmuch then as the defendant is not liable under the common law, it is clear that he cannot be held liable unless there be some statute making him so. Section 38 of Article 56 says: "No person or corporation, other than the grower, maker or manufacturer shall barter or sell, or otherwise dispose of, or shall offer for sale any goods, chattels, wares or merchandise, within this State, without first obtaining a

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license in the manner herein prescribed," etc. Section 39, after providing for obtaining licenses from the Clerk of the Circuit Court in the counties, or the Clerk of the Court of Common Pleas in Baltimore City, goes on to provide, "but no license to trade or to sell spirituous or fermented liquors shall be issued by any clerk of a Court to a *feme covert*, or to any person under the age of twenty-one years, without the special order of a judge of said Court; and no judge shall give such special order to issue such license to sell spirituous or fermented liquors to a *feme covert*, or person under the age of twenty-one years, unless upon the recommendation of at least ten respectable free-holders, residents of the ward or district wherein said license would be operative; and whenever any license shall be issued to a *feme covert* or minor, the said *feme covert* or person under the age of twenty-one years shall be responsible for all contracts made in the prosecution of such business under such license and shall be liable to be sued therefor in any of the Courts of this State," etc.

The only liability fixed by the statute is "*whenever any license shall be issued to a feme covert or minor, the said feme covert or person under the age of twenty-one years shall be responsible for all contracts made in the prosecution of such business under such license.*" Manifestly that language can not by any construction known to the law be construed to mean that any minor who engages in such business as is mentioned in sections 38 and 39 is responsible for contracts made in the prosecution of such business, because he was required to take out a license by the laws of Maryland in order to engage in the business, although he did not have the license therein provided for. If the Legislature had so intended, it would have said that every minor who shall barter or sell or otherwise dispose of, or shall offer for sale any goods, chattels, wares or merchandise within this State shall be responsible for all contracts made in the prosecution of such business. The Legislature was, however, not willing to let every minor procure a license, but only such an one as obtained a special order of a judge of the Court authorizing the clerk to issue

the license to him or her. The theory of the Legislature doubtless was that it would not do to permit every minor to have a license, but only such as a judge of the Court authorized, after properly informing himself, which he would be presumed to do. If a minor sells without license he is liable to be prosecuted, under section 94 of Article 56, if he has reached the age of criminal responsibility, for of course his exemption from liability for his contracts would not relieve him from criminal prosecution.

Whether or not it would be wise to make a minor responsible under such circumstances as are set up in this replication is not for us to determine, but we can have no hesitation in holding that the Legislature of Maryland has not yet done so. As then this defendant is not responsible in this suit either at common law or by statute, the lower Court was undoubtedly right in its ruling and the judgment must be affirmed.

It may be well to add that we have not thought it necessary or proper to discuss the changes in our statutes in reference to married women since the Code of 1888. What was section 36 of Article 56 of the Code is now sec. 39 of that Article in the Code of 1912. There have been some material changes in Article 45,—particularly sections 5 and 20—in reference to married women engaging in business, but they are not involved in this case. There have been no changes in what is now section 39 of Article 56 in reference to minors, and hence the provisions of that section are still in all respects applicable to them.

Judgment affirmed, the appellant to pay the costs.

Md.]

Syllabus.

THOMAS T. BOSWELL

vs.

EUGENE L. NORTON.

Evidence: res inter alios; erroneous rulings; when no ground for reversal. Stock: subscriptions to—.

For rulings of the trial court upon the admissibility of evidence to justify reversal on appeal, there must appear to have been error on the part of the court, and injury caused thereby to the appellant. p. 14

Upon a question of whether the president of a corporation had personally and individually subscribed for certain shares of stock in another company, the ledger of the former company, showing the account of the vendor of the stock with that company, is *res inter alios acta*. p. 14

Decided January 13th, 1915.

Appeal from the Superior Court of Baltimore City.
(BOND. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BURKE, BRISCOE, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

J. Royall Tippet, for the appellant.

J. Craig McLanahan (with whom was *Jacob France* on the brief), for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

Mr. Eugene L. Norton at the time of the happening of the events out of which this case arises was the president of the Munsey Trust Co. Mr. Thomas T. Boswell was interested in pushing the business of the Pocohontas Coal Mining Company, and he believed that it would conduce to the advancement of that company to have Mr. Norton's name appear in the list of the directors, and accordingly transferred to him a share of the stock in order that he might be qualified for election upon the board. Mr. Boswell was further anxious to secure a more direct or larger interest upon Mr. Norton's part in the coal mining business, and, therefore, discussed with him a number of times the sale to Mr. Norton of an additional amount of stock in the company. The recollection of these two people as to just the nature of the agreement, if any, which was ultimately arrived at, differs materially. Mr. Boswell's belief apparently was that Mr. Norton agreed to take twenty shares of the stock at 50, including the one share previously given him, and that this was a sale of a portion of the stock then owned by Mr. Boswell. Mr. Norton, on the other hand, seems to have been uncertain with regard to the investment and disposed to delay until some future time the final determination of whether he would or would not purchase stock in the company. Be that as it may, one fact is beyond dispute, that two additional certificates of stock, one for nine shares and one for ten shares of the capital stock of the company were made out and signed by the president and secretary and treasurer, and delivered to Mr. Norton, certifying that he was the owner of them, though none of the three certificates bore any date. This stock, Mr. Norton testified, he supposed to be from the treasury stock of the company, and not that of Mr. Boswell, individually.

The account which was made out by Mr. Boswell against Mr. Norton names December 12th, 1913, as the date of alleged purchase, though Mr. Boswell in his testimony fixes the month of November as the time when he gave Mr. Norton

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the one share to qualify him for the directorate. By the account Mr. Norton is made Mr. Boswell's debtor in the sum of \$1,000 for the twenty shares, and there are credited against this two amounts of \$250 and \$150, respectively, as cash payments on account of the purchase, and the suit is brought to recover the remaining \$600.

Mr. Norton's theory is that the \$400 were not intended as in any sense payments on account of the purchase of the stock, but that as he had possession of twenty shares of the stock individually, in his capacity as president of the Munsey Trust Company, he gave his assent that Mr. Boswell might check against and overdraw his account with the Trust Company to the extent of the aggregate of these two items. An issue of fact, almost of veracity, was thus raised between the parties to the cause.

After the plaintiff and defendant on the witness stand had given their versions of the business dealings between them, the defendant, for the purpose of substantiating his side of the case, produced the statement clerk of the Munsey Trust Company, who produced a leaf, taken from the Loose Leaf Ledger of that company, showing the account of Thomas T. Boswell with the company. This was objected to, but admitted by the Court, and this admission is the sole matter now presented for determination.

This account was offered and intended, doubtless, as original and substantive evidence of the fact indicated by the entries, which had in a general way been testified to by Mr. Norton. There had been no examination of the witness producing the account, with regard to the issue involved in the case, in which allusion had been made to the ledger account between Boswell and the Trust Company, so as to make evidence of this character admissible under the doctrine laid down in 40 *Cyc.* 2529, relied on by the appellant. There is no question in the present case that the stock negotiations were between Mr. Boswell and Mr. Norton in his capacity as president of the Trust Company. It was an attempted

sale of stock by Mr. Boswell to Mr. Norton, as an individual, and such being the case, the ledger or the entries in it were inadmissible to affect the rights of the appellant. They were made out of his presence, and without his knowledge or assent. They were *res inter alios acta* and not binding upon him. *Atlantic Ins. Co. v. Carlin*, 58 Md. 341; *Owings v. Low*, 5 G. & J. 135; *Lewis v. Kramer*, 3 Md. 265; *Hoogewerff v. Flack*, 101 Md. 382.

It remains to consider whether the evidence thus erroneously admitted must be regarded as operating to the injury of the plaintiff, because to justify a reversal on appeal there should be a concurrence of error on the part of the Court below and of injury thereby resulting to the appellant. *Leffler v. Allard*, 18 Md. 545; *Wallis v. Wilkinson*, 73 Md. 128; *Cecil Paper Co. v. Nesbitt*, 117 Md. 59; *C. & P. Tel. Co. v. Carey*, 124 Md. 527. The main issue presented to the Court by the pleadings and evidence was, whether there had or had not been a sale of stock by Mr. Boswell to Mr. Norton, which remained in part unpaid for; and subsidiary to this, though necessarily involved in it, was the question whether there had been a loan by Mr. Norton to Mr. Boswell of money or credit, as security for the repayment of which he retained possession of certificates of stock which had been made out in his name. There is no claim on the part of the defendant that the account, if admitted, would do anything more than show certain overdrafts by Mr. Boswell in his banking account, and how evidence that he had or had not overdrawn a particular bank account could in any way bear upon or affect beneficially or injuriously the issues of the case, it is impossible to see.

The judgment appealed from will accordingly be affirmed.

Judgment affirmed, with costs to the appellee.

Md.]

Syllabus.

AMELIA BASFORD AND JOHN B. GRAY, GUARDIAN AD
LITEM FOR JESSIE BASFORD AND IDA BASFORD,

vs.

JOHN L. CRANFORD, ANNIE GERTRUDE CRAN-
FORD, WALTER W. CRANFORD.

*Partition of real estate in equity: Code, Article 46, section 34;
appointment of commissioners; merely formal irregulari-
ties in justification; failure to be sworn when first
appointed; "due notice"; effect of—; equiva-
lent to legal notice; commissioners' re-
turn setting aside.*

The fact that commissioners, appointed by a court of equity to make partition of and divide real estate, failed to be sworn, as required by law and by their commission, does not vitiate their return, when it appears that no determination, decision or conclusion was reached by them, and no part of the duties imposed upon them was in fact completed, until each of the commissioners had taken the required oath. p. 18

The returns of commissioners, appointed under Article 46 of the Code, to make partition of real estate, are not to be set aside for unsubstantial and merely formal irregularities.

pp. 23-24

"Due notice" means, in the manner prescribed by law. p. 21

The statement in such a return that the commissioners had given "*due notice*," is to be construed that they had given the notice required by section 34. p. 19

To justify a court in setting aside a partition of real estate on the ground of a mistaken judgment on the part of the commissioners, the mistake must be a serious one, and the evidence of it too plain to be in doubt. p. 24

Decided January 13th, 1915.

An appeal from the Circuit Court for Calvert County in Equity. (BEALL and CAMALIER, JJ.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

John B. Gray, for the appellants.

J. Briscoe Bunting, for the appellees.

THOMAS, J., delivered the opinion of the Court.

This appeal is from an order of the Circuit Court for Calvert County, overruling the exceptions of the appellants and ratifying the return of commissioners appointed by that Court to make partition of and divide the land of Franklin Cranford, deceased, between his heirs at law.

The deceased left a widow, two sons and three grandchildren, children of a deceased daughter, two of whom were minors under the age of twenty-one years, and the grounds

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of the exceptions filed by the three grandchildren are as follows:

"1st. Because the commissioners were not sworn as required by law and the commission issued in said cause, before entering upon their duties in the premises.

"2nd. Because the return of the said commissioners filed as aforesaid does not show that notice was given to the parties interested as required by law.

"3rd. Because one of the commissioners, to wit, Evered B. Mead, owned property adjoining the property to be partitioned, which fact was unknown to your exceptants at the time of the appointment of the commission.

"4th. Because the value placed upon the property by the majority of the commissioners is absurdly and ridiculously low and far below its real or market value.

"5th. Because the commissioners who placed the valuation upon the property and who signed the return, did not consider the views of valuation of the two commissioners who refused to sign the returns and completely ignored them in making up their returns.

"6th. Because the property could have been divided into three equal parts without loss or injury to the parties interested."

The exceptions were set down for hearing, with leave to the parties to take testimony, and the case was finally heard upon the exceptions and the evidence produced by the parties in pursuance of said order. The appellants rely, in this Court, upon the first, second, third and fourth exceptions, and the others are not pressed.

It appears from the evidence that the five commissioners went upon the property and began the survey of the land on the 22nd of December, 1913; that they did not take the oath attached to their return that day because they were unable to secure a Justice of the Peace; that they did not complete

the survey of the land on the 22nd, and that they met again on the property for that purpose on the 27th of December, on which day each of the commissioners took the oath before the completion of the survey; that they met again on two other days, and after ascertaining the result of the survey, the number of acres in the property, etc., endeavored to determine the value of the property; that they were unable to reach an agreement as to the value of the property, with the result that three of the commissioners made and filed their return, in which they state: "That all the commissioners appointed by the said Court met upon the said property according to the notice given and qualified by taking the oath annexed to the commission and proceeded to have the said lands surveyed and laid out and agreed that the said property could not be divided in more than two parts without loss and injury to the parties entitled, but that the commissioners Joseph E. Ogden and John E. Wilburn were unable to agree with the subscribing commissioners as to the value of the said property, whereupon, the subscribing commissioners, being a majority of the commissioners appointed as aforesaid, valued the said property according to our skill and judgment as set forth in this their return," etc.

It therefore appears that no determination, decision or conclusion was made or reached by the commissioners, and no part of the duties imposed upon them was completed until after each of the commissioners had taken the required oath, and that the parties interested had all the protection the oath was intended to secure. While the commission, and the approved practice, required the commissioners to take the oath before undertaking to discharge their duties, their failure to strictly comply with the requirement is not sufficient, *under the circumstances*, to vitiate their return. *Jordon v. McNulty*, 14 Col. 280.

In regard to the second ground of the exceptions to the return, it is important to note that it is not alleged that the required notice was not given, and there is no question here as to whether a notice was *in fact* given. The single inquiry

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is, does the return, in the absence of any suggestion or averment to the contrary, sufficiently show a compliance with the statutory requirement?

The bill was filed under the provisions of Article 46 of the Code of 1912, and section 34 of that article provides that, "In the execution of this article, and before any proceeding is had by the commissioners, they, or a majority of them, shall cause notice to be given to all the parties concerned by advertisement set up at the door of the court-house of the county or counties or city where the lands may lie, and in such other public places in the county or counties or city as they may direct, at least thirty days previous to their proceeding to execute the said commission." Section 37 provides that "In all cases where, by this article, any notice or publication is required, a statement made in the proceedings that due notice, according to law, has been given, or to that effect, shall be *prima facie* evidence that notice was given according to law." Section 42 requires the commissioners to make a return of their proceedings to the Court, which may reject or ratify it, and authorizes an appeal from the judgment of the Court, and section 70 declares that, "No proceedings of any commissioners under this article shall be set aside for matter of form." The manifest object and purpose of these provisions is to provide for a fair and equitable partition and division of property between heirs at law entitled to it, and while safeguarding their interests, and affording them ample protection from the evil consequences of a substantial departure from the procedure pointed out, there is an express inhibition against setting aside the proceedings of the commissioners for unsubstantial and formal irregularities.

The return of the commissioners in this case states that after taking the oath, etc., "and having given due notice to the parties of the time and place of our meeting, we did," etc., and the contention of the appellants is that it does not show that they gave the notice required by section 37. In the case of *Brownell v. Town of Greenwich*, 22 N. E. 24, the

proceedings involved were statutory, and the case was submitted upon an agreement containing, among other things, the stipulation that the judge of Washington County "duly adjudged, determined, and ordered," etc. In construing the agreement the Court of Appeals of New York said: "The statute authorized the county judge to so 'adjudge and determine' only in case it had been in all things complied with. *Laws* 1869, Ch. 907, sec. 2. How then, could he 'duly' adjudge unless every step required had been taken? 'Duly,' in legal parlance, means according to law. *Gibson v. People*, 5 Hun. 542, 543; *People v. Walker*, 23 Barb. 304; *Fryatt v. Lindo*, 3 Edw. Ch. 239; *Burns v. People*, 59 Barb. 531, 543; *Webb v. Bidwell*, 15 Minn. 479, 484 (Gil. 394). It does not relate to form merely, but includes form and substance both. The expression 'duly adjudged,' as used in the statement for the submission of this controversy, therefore, means adjudged according to law,—that is, according to the statute governing the subject,—and implies the existence of every fact essential to perfect regularity of procedure, and to confer jurisdiction both of the subject matter and of the parties affected by the judgment, including the defendant." In the case of *Dreher v. Yates*, 43 N. J. L. 473, the ordinance in question authorized the officers to remove certain nuisances, "if such article or thing shall not be removed within two hours after notice to the owner thereof," and the Court in disposing of a demurrer to a plea said "The plea, in this respect, does not explicitly state, as it undoubtedly should do in strictness, that such a two hours' notice was served, but in lieu thereof it avers that the defendants proceeded to remove the obstruction, 'after due notice in writing to the said plaintiff, to remove the same, and after the time limited in said notice for the removal of the same.' It will be noted that the allegation is that due notice was given, and that due notice must mean, *ex necessitate rei*, a two hours' notice. A traverse, therefore, of the allegation of due notice would, in substance and by indirection, raise the issue whether the notice required by the law had been given." And

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in the case of *Slatery v. Doyle*, 61 N. E. 264, the Supreme Court of Massachusetts said: "'Due notice' must mean in the manner prescribed by law." See also *Words and Phrases*, Vol. 3, p. 2227.

It would seem therefore upon authority as well as upon a fair construction of section 37 of the Article referred to, that the statement in the return that the commissioners had given "due notice" should be construed to mean that they had given the notice required by section 34. The appellant, however, cites and relies upon the cases of *Cecil v. Dorsey*, 1 Md. Ch. 223, and *Stallings v. Stallings*, 22 Md. 41. In *Cecil v. Dorsey*, the return states that the commissioners had given "reasonable notice," and the Chancellor said: "They must say, either that they gave at least thirty days' notice, or due notice according to law (which is the same thing substantially), or to that effect, or their proceedings do not conform to the law. To say that the statement, that reasonable notice was given, is sufficient, would be to refer to the opinion of the commissioners in each particular case, the reasonableness of the notice." In the case at bar the statement is not that *reasonable notice* was given, but that *due notice* was given, which would seem to comply with the requirements of the Chancellor in the case referred to. In the case of *Stallings v. Stallings*, *supra*, the appeal was from a final decree in the case, and JUDGE COCHRAN, in pointing out a number of defects in the return of the commissioners, said: "The return states, 'that after having given due notice, according to law, to the parties, they entered,' etc. What notice was given does not appear, and at most the return only shows that such notice was given as the commissioners thought was sufficient to satisfy the terms of the Act. That, in our opinion, was not sufficient. The return ought to show affirmatively what the notice was, as well as how it was given, so that the real fact would appear to the Court entirely disconnected and free from the inferences of the commissioners in regard to its sufficiency." After referring to

that defect, among a number of others, the learned Judge said further: "But there are other fatal defects," and then proceeds to point out what the Court designated as "fatal defects." No reference is made in that case to the decision in *Cecil v. Dorsey*, or to the provision of what is now section 37 of the Code, and if we were to construe the language of the Court to mean that the statement in the return as to the notice rendered it fatally defective, we would have to assume that the Court entirely overlooked the conclusion of the Chancellor in *Cecil v. Dorsey*, *supra*, as well as the express provision of the statute. What the Court meant in *Stallings v. Stallings*, *supra*, was that the better practice required the commissioners to state definitely what notice was given, and in that view we entirely concur. See also *Carey's Forms*, 604.

In regard to the third exception it is only necessary to say that Mr. Mead was not disqualified because of the fact that he owned property adjoining that to be divided by the commissioners.

According to the testimony of John E. Wilbern and Joseph E. Ogden, the two commissioners who declined to unite in the return of the majority of the commissioners for the reasons stated in the return, and Thomas J. Basford, the father of the appellants, the land to be divided was worth from \$6,000.00 to \$6,590.00, while the three commissioners who signed the return, and a number of other witnesses, who resided in the neighborhood of the property, valued it at from \$4,000.00 to \$4,500.00, the value stated in the return being \$4,500.00. It would serve no purpose to discuss this evidence in detail. The commissioners who made the return base their valuation upon the character and condition of the land and the condition of the buildings, and the other witnesses whose testimony was given in support of the return, were not only familiar with the character of the land and the condition of the buildings and improvements, but were able to state the value of the crops raised, on the property.

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In the case of *Crouch v. Smith*, 1 Md. Ch. 401, the Court said: "In the case of *Cecil v. Dorsey et al.*, this Court was recently called upon to consider the effect which should be given to the valuation made by commissioners, appointed to make partition of the real estate among the parties entitled; and upon full argument and deliberation it was decided, that though such valuation was not conclusive, and might be rejected if clearly shown to be erroneous, yet still it was entitled to great respect, and would not be disturbed unless the weight of evidence in opposition to it was decidedly preponderating. The commissioners were regarded as occupying the double capacity of arbitrators and witnesses, and it was thought that the Court would not be justified in reversing their judgment, unless upon evidence of error as strong or stronger than would induce a court of law to reject the verdict of a jury, and order a new trial." This view is the one expressed by *Mr. Miller* in his work on *Equity Procedure*, section 440, and in the comparatively recent case of *Claude v. Handy*, 83 Md. 225. JUDGE BOYD, referring to the return of commissioners appointed to make partition of property, and speaking for this Court, said: "It was *their* duty and not that of the Judge to view and examine the properties, place just valuations on them and allot them fairly and equally. Their functions are exceedingly important in the administration of justice, and the acts done by them, with the peculiar opportunities they have of reaching proper conclusions, are not permitted by the law to be questioned by conflicting or doubtful testimony. Even if a Court be of the opinion that it might have found differently as to some of the values, it can not substitute its judgment for theirs, unless sustained by clear and satisfactory evidence of error on their part, which has wronged one or more of the parties whose property they are selected to value and allot. Some courts regard these reports and awards in the light of verdicts of juries, and will set them aside only upon grounds similar to those upon which a verdict will be set

aside and a new trial granted. 17 *Am. and Eng. Enc. of Law*, 777. Some treat them with more respect than verdicts when the commissioners are selected by the parties in interest, with special reference to their qualifications. *Livingston v. Clarkson*, 4 Edw. Ch. (N. Y.) 596. 'To justify the Court in setting aside a partition of real estate on the ground of a mistaken judgment on the part of the commissioners, the mistake must be a serious one and the evidence of it too plain to be mistaken. If the evidence be doubtful or contradictory, the report will be sustained * * *. Upon no subject do men differ more in opinion than in the value of real estate.' "

Applying these well established principles to the case at bar, we are unable to find such evidence of error in the judgment of the commissioners who made the return as would justify the Court in setting it aside.

In this view of the case it is not necessary to pass upon the exceptions to the evidence, only one of which was pressed in this Court, and for the reasons stated we must affirm the order from which this appeal was taken.

Order affirmed, with costs to the appellees, and case remanded.

Md.]

Syllabus.

THOMAS CUTTY

vs.

WILLIAM M. CARSON,

CLERK OF THE CIRCUIT COURT OF BALTIMORE CITY.

Osteopathy: practice; regulation of—; Chapter 786 of the Acts of 1914.

Chapter 786 of the Acts of 1914 prohibits the practice of osteopathy by any except graduates of institutes having a corporate character and affording designated courses of study; and requires that all practioners of osteopathy should be registered by the clerk of the circuit court of the county or city where their practice is being conducted. pp. 28-30

The requirement of registration applies to those who were in practice before the Act was passed, as well as to those who qualify *after* the law became effective. p. 31

Those who, before the statute, were not practioners of osteopathy are required to be examined by the State Board, and to obtain the board's license, before they are entitled to registration as such practitioners. p. 30

But, under the Act, one who, before its passage, was a graduate of an incorporated college of osteopathy, and a practitioner of that school, in order to be entitled to register, need not procure a license from the State Board. pp. 31, 32

Where a statute, in one section, expressly limits the scope of its application, the whole statute should be so construed, although other sections contain language that would ordinarily be of a wider scope. p. 33

The real intent of a statute, when ascertained, will always prevail over the literal sense of its language. p. 33

The law requires that an applicant for registration (who has been a practitioner before the passage of the Act) should make affidavit that he had been granted a diploma by a reputable incorporated college, etc.; such a practitioner was refused the right to register, on the ground that he had no license from the State Board; in a petition against the clerk to compel him duly to register, etc., the petition averred that the petitioner was such a graduate, etc., and that he offered to make the affidavit required by the Act, and tendered the proper fee, but was denied the opportunity: *Held*, that the allegations were sufficient to call for an answer as to the facts, and that a demurrer to the petition was not sustainable. p. 35

The averments in the petition were not open to the objection of being mere conclusions of law. pp. 35, 36

Decided January 13th, 1915.

Appeal from the Superior Court of Baltimore City.
(BOND, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, PAT-
TISON, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.
case.

John Holt Richardson, for the appellant.

Lawrence J. McCormick (with a brief by *Wells & McCormick*), for the appellee

URNER, J., delivered the opinion of the Court.

The petition filed by the appellant in the Court below recites that the Act of 1914, Chapter 786, providing for a

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• Opinion of the Court.

State Board of Osteopathic Examiners and for the examining, licensing and registration of osteopaths in this State, includes a provision that nothing in the statute should be construed to affect the right to practice osteopathy on the part of any person who was engaged in such practice in Maryland at the time of the approval of the Act and to whom there had been granted a diploma from a legally incorporated and reputable college of osteopathy, but that such a person appearing before the Clerk of the Circuit Court of the county in which he or she was practicing, or before the Clerk of the Circuit Court of Baltimore City, and making affidavit to that effect, and upon the payment of a fee of one dollar, should be registered. It was then alleged that the petitioner, being in the practice of osteopathy in this State at the time of the approval of the Act of 1914, and having so practiced for more than two years, and enjoying a large, successful and lucrative practice, and being a graduate of, and having a diploma from the Maryland College of Osteopathy, a body corporate under the laws of Maryland, duly authorized by its charter to issue such diploma, made application to the Clerk of the Circuit Court of Baltimore City to be registered under section 9 of the Act of 1914, and tendered himself ready and willing to make the affidavit and pay the fee required by that section, but the clerk refused to let the petitioner make the affidavit or to register him as provided by law. The prayer of the petition is that the writ of mandamus may issue directing the clerk to duly register the petitioner as an osteopath upon his making the affidavit and paying the fee specified in section 9 of the Act.

A demurrer to the petition was filed by the defendant, and upon this there was a joinder of issue. The Court below sustained the demurrer and dismissed the petition. From the order thus disposing of the case the petitioner has appealed.

The question we are to decide involves the construction of Chapter 786 of the Acts of 1914, codified as sections 290 and

303, inclusive, of Article 43, of the Annotated Code, in so far as the provisions of the statute are concerned with the rights of osteopaths in the situation of the appellant.

The first six sections of the Act deal with the appointment, qualifications, tenure, powers, duties and compensation of the Board of Osteopathic Examiners. Then follows, in section 296, a provision that any person who was engaged in the practice of osteopathy in this State at the time of the approval of the Act might deliver to the secretary of the Board of Examiners, on or before June 15, 1914, a written application for license to practice osteopathy, together with satisfactory proof that the applicant is not less than twenty-one years of age, is of good moral character, and has obtained a diploma from some legally incorporated reputable osteopathic college, requiring a course of study and personal attendance of at least four terms of five months each for graduation, and that upon payment of a fee of ten dollars the secretary of the board should issue to the applicant a license to practice osteopathy in this State.

Section 297 provides that from and after the approval of the Act (which occurred on April 13, 1914), any person not theretofore authorized to practice osteopathy in Maryland, and desiring to enter upon such practice, may deliver to the secretary of the Board of Examiners, upon the payment of a fee of twenty-five dollars, a written application for examination, together with satisfactory proof that the applicant is more than twenty-one years of age, is of good moral character, has obtained a preliminary education as later described in the Act, and has received a diploma conferring the degree of doctor of osteopathy from some legally incorporated reputable osteopathic college, wherein the course of instruction consists of at least three separate years of not less than nine months in each year. There are additional provisions in section 297 covering the educational requirements in cases of applicants who receive their degrees after January 1, 1917, and those who were graduate practitioners

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of osteopathy in other States of April 13, 1914. In the same section the subjects and standard of the examinations are prescribed, and it is directed that the board shall issue to each applicant who shall pass the examination and be adjudged duly qualified a license to practice osteopathy as provided in a later section.

In section 298, which is the same as section 9 of the statute as enacted, there is a definition of the term "reputable" as previously applied in the Act to schools and colleges of osteopathy from which applicants are required to have diplomas. The section then provides: "that nothing in this sub-title (Act) shall be construed to affect the right to practice osteopathy, on the part of any person who is in the practice of osteopathy within this State on April 13, 1914, and who has had granted unto him or her a diploma from any legally incorporated and reputable college of osteopathy. Such a person appearing before the clerk of the county in which he or she is practicing, or clerk of the Circuit Court of Baltimore City, and making affidavit to that effect, and upon the payment of a fee of one dollar shall be registered."

Section 299 regulates the issuance of licenses in Maryland to applicants who have been examined and licensed in other States, and contains a provision that: "Any person receiving a license from said board shall file the same at once with the clerk of the Circuit Court of the county in which he or she may reside, or with the clerk of the Circuit Court of Baltimore City, if said person shall reside therein, and it shall be the duty of said clerk to register the name of said person and of the president of the board signing said license in a book kept for the purpose, as a part of the records of his office." In case of the permanent removal of the licensee to another part of the State, the license, or a certified copy, is required to be filed at once with the clerk of the Circuit Court of the county or city to which the practitioner shall have removed. A fee of fifty cents is directed to be paid for such registration of licenses.

Osteopathy is defined in section 300, which also declares it to be a misdemeanor, punishable as specified, for any person unlawfully to procure himself to be registered as an osteopath "either by false and untrue statement contained in his or her application to the clerk of the Court, as required by this sub-title, or by presenting to said clerk a false or untrue license, or one fraudulently obtained by false and fraudulent statements made to said Board of Osteopathic Examiners."

By section 301 osteopaths are made subject to all State and municipal regulations relating to the control of contagious diseases.

Section 302 provides that: "From and after April 13, 1914, no person shall enter upon or continue the practice of Osteopathy in the State of Maryland unless he or she has complied with the provisions of this sub-title, and shall have exhibited to the clerk of the Circuit Court of Baltimore City, or the clerk of the Circuit Court of the county in which he or she desires to practice osteopathy, a license duly granted to him or her, as hereinbefore provided, whereupon he or she shall be entitled, upon the payment of one dollar, to be duly registered in the office of the clerk of the Circuit Court of Baltimore City, or the clerk of the Circuit Court of the county; and any person who shall practice or attempt to practice osteopathy * * * without having first obtained the license herein provided for, or contrary to the provisions of this sub-title * * * shall be deemed guilty of a misdemeanor," and upon conviction be subject to stated penalties.

The final section, 303, directs the State Board to refuse or revoke licenses in cases where the applicant or licensee has been convicted of procuring, aiding or abetting a criminal abortion, and authorizes the board to, refuse, revoke or suspend the right to practice osteopathy in this State for other specified reasons.

It is further provided that: "Any citizen of Maryland having information which causes him to believe that any

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person has been heretofore wrongfully and improperly registered as osteopath, upon his application to the clerk of any Court, may apply, by petition, to the Circuit Court of the county wherein such registration was made, or to the Circuit Court of Baltimore City, if such registration was in Baltimore City, which petition shall be under oath, and shall state that the petitioner is informed and believes that the person named therein has been heretofore improperly and wrongfully registered as osteopath upon his own application and affidavit upon the register of osteopaths or book kept for such purpose in any Court of this State, for the reason (as said petitioner is *empowered*) that such person was not lawfully practicing osteopathy in the State of Maryland as a duly qualified osteopath in said State entitled to be registered as an osteopath upon his own application to the clerk of the said Court." Provision is made for the trial and determination of the charge thus preferred. The section makes it the duty of the Police Commissioners of Baltimore City, and of the sheriffs of the various counties, to see that all practicing osteopaths in the State shall be duly registered according to the requirements of the Act.

There are certain objects contemplated by the provisions to which we have thus referred as to which there can be no controversy. It is the evident purpose of the Act that all practitioners of osteopathy in this State shall be registered. The intent is clear also to prohibit the practice of osteopathy except by graduates of institutions having the corporate character and affording the courses of study designated. These requirements apply as well to those who were in practice before the Act was passed as to those who have become qualified since it has been operative. There is the further manifest design that applicants who were not authorized to practice before the enactment of the statute must pass an examination and obtain a license from the State Board. It is equally plain that graduate osteopaths who were engaged in practice in Maryland prior to the approval of the Act

are not required to undergo an examination. But the question presented for our decision is whether such practitioners are subjected by the statute to the necessity of obtaining a *license* from the State Board of Examiners as a preliminary to their *registration* by the clerk of the Circuit Court of the county or city in which the practice is being conducted.

The petitioner states that he was a practicing osteopath in Baltimore before the Act became effective, and held a diploma as a graduate of the Maryland College of Osteopathy, incorporated, and had offered to make the prescribed affidavit, but he did not allege that he had obtained from the board, and proposed to file with the clerk a license for the practice of osteopathy. It is urged by the appellee that this was a prerequisite to the appellant's registration, and that as there was no averment of this essential fact, the demurrer to the petition was properly sustained.

The difficulty in the case arises from an apparent inconsistency between two of the provisions we have quoted. According to section 298, the right to practice osteopathy is not affected by the Act in the case of any person who was engaged in such practice before April 13, 1914, and who had received a diploma from an institution of the character described, but such a person may be registered upon making affidavit to the facts just stated and paying a fee of one dollar. But section 302 provides that from and after the date mentioned no person shall enter upon or continue the practice of osteopathy unless he shall have complied with the terms of the Act and exhibited to the clerk of the Circuit Court of the city or county in which he desires to practice a license duly granted him by the State Board. The contention is that section 302 applies not only to those who enter upon the practice of osteopathy after the passage of the statute, but also to those who were practicing in Maryland prior to this legislation and who desired to continue in the exercise of that privilege after the Act became effective.

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The section would undoubtedly admit of this interpretation if we were at liberty to consider its meaning with exclusive reference to its own terms. Such a construction, however, is expressly forbidden by the declaration in section 298 that nothing in the Act shall be construed to affect "the right to practice osteopathy on the part of any person who is in the practice of osteopathy within this State on April 13, 1914," as to whom registration alone, under the conditions stated, is made essential. It becomes necessary, therefore, to interpret the language of section 302 in conformity with the principle which the statute itself has thus established. The provision that from and after April 13, 1914, no person shall enter upon or continue the practice of osteopathy without procuring both license and registration, must accordingly be understood as not applying to those who, as graduate practitioners at the time of the enactment, were specifically authorized to continue in the practice upon the sole condition of becoming registered after making the affidavit and payment indicated. The other classes mentioned in the Act are osteopaths who were non-resident practitioners at the time of its passage, and all who thereafter entered upon the practice in Maryland, and it is to these classes alone that the provision of section 302 in question must be held to apply. The words employed are susceptible of such an application, and we are required to thus limit and interpret their meaning in deference to the rule of construction which the Act itself has prescribed. It is a familiar principle in the interpretation of statutes that: "The real intent, when ascertained, will always prevail over the literal sense of the language, *State v. Milburn*, 9 Gill. 109; *Milburn v. State*, 1 Md. 17; because both the canons of verbal criticism and the rules of grammatical construction must alike yield to the manifest spirit and intent of the enactment. Or, as differently expressed, 'Sometimes cases not within the words are held to be within the Act, and other cases are by construction taken without the operation of the law, though covered by the lan-

guage, according to the intent and design of the Legislature,' *Wilson v. State, use of Davis*, 21 Md. 1." *Roland Park Co. v. State*, 80 Md. 451.

There are provisions of the Act, apart from the one we have quoted from section 298, which were evidently framed in pursuance of the legislative purpose that graduate osteopaths in practice before the approval of the statute should not be subjected to the necessity of procuring a license from the State Board, but should be authorized to continue their practice upon obtaining registration by the clerk in the appropriate jurisdiction. In section 303, which deals in the first instance with the refusal, revocation or suspension of licenses by the Board, a separate and different procedure is provided for cancelling the registration of those who have been wrongfully and improperly registered as osteopaths upon their "*own application and affidavit*" before the clerk. There is no provision for such application and affidavit except in the cases of osteopaths who were practicing in the State prior to the Act. Section 300, as already noted, prohibits the unlawful procurement of registration either *by a false statement in the application to the clerk*, or *by the presentation of a fraudulent license*. There are penalties imposed in section 302 upon any person convicted of practicing osteopathy without having first obtained the license provided for, "*or contrary to the provisions*" of the statute. It is true that those who were engaged in the practice of osteopathy when the statute was enacted were permitted by section 296 to obtain a license from the State Board, on or before June 15, 1914, upon proving the specified facts as to age, character and training, and paying a fee of ten dollars, but this is not made compulsory, and the only object of the provision apparently was to give the prior practitioners the option of securing a license with a view to simplifying the process of registration in case of removal, it being provided in section 299 that if a licensee, after the recording of his license, should permanently remove his residence to some other part

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of the State he should merely file his license, and have it registered, at a cost of fifty cents, with the clerk of the county or city of his new abode, whereas one who, being in previous practice has simply procured registration, without obtaining a preliminary license, must, in the event of removal, make the affidavit and pay the fee of one dollar required by section 298.

But aside from the other supporting considerations to which we have thus alluded, we are of the opinion that the distinct and positive rule of construction which the statute declares must control our decision of the question we have discussed. Our conclusion therefore, is that it was not necessary for the petitioner in this case to allege or prove that he had procured a license from the State Board of Examiners as a prerequisite to his right to be registered.

The demurrer raises other objections to the sufficiency of the petition for mandamus. It is said to be defective in not alleging that the petitioner is a graduate of a "reputable" college within the statutory definition of that term. The petition, as already recited, avers that the petitioner is a graduate of the Maryland College of Osteopathy, incorporated, and as such holds a diploma which the college was duly authorized to issue, and that he offered to make the affidavit required by the section referred to, which would necessarily include a sworn statement that he had been graduated from such a college of osteopathy as the law defines and recognizes to be reputable. The making of such an affidavit and the payment of the fee of one dollar, which is alleged to have been also tendered, are the only conditions of registration under section 298, and the complaint here is that the appellant was denied an opportunity to comply with these requirements. In our view the allegations of the petition in this respect sufficiently state a case which calls for an answer as to the facts, and the demurrer was not sustainable on the ground just considered.

The objection that the averment of the offer to make the affidavit and pay the fee as required by section 298 is the

statement of a mere conclusion of law must also be overruled. The affidavit required is that the applicant for registration was a practitioner when the Act went into effect and that he had been granted a diploma by a legally incorporated and reputable college of osteopathy, and the offer to make such an affidavit is alleged to have been refused. It is clear that the case as thus presented is not within the principle which the appellee invokes. An entirely different situation existed in *Harwood v. Marshall*, 10 Md. 451, which has been cited in this connection. In that case an alternative writ of mandamus averred that the plaintiff had taken the oaths of office prescribed by the Constitution and laws for the State Librarian, and the answer to the writ alleged that the oaths were not taken in manner and form as directed by the Constitution and laws of the State. This response was held to merely state a conclusion of law. The principle of that case evidently has no application to the one now under consideration.

As we are unable to concur in the ruling of the learned Judge below in sustaining the demurrer and dismissing the petition, it will be necessary to reverse the order appealed from and remand the case for further proceedings.

Order reversed, with costs, and cause remanded.

Md.]

Syllabus.

MILTON W. WELSH

vs.

ISABELL F. DAVIS.

Deeds: power of alienation; merchantable title.

If by a grant D. has an estate in lands for life, with power to sell the same, and after his death, should he not have sold the lands, the same to be divided equally among the grantee's children, D. has the power to convey a good and marketable title to the property.

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Decided January 13th, 1915.

Appeal from the Circuit Court for Howard County (In Equity. (FORSYTHE, JR., J.)

The facts are stated in the opinion of the Court.

The cause was submitted to BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Reuben D. Rogers submitted a brief for the appellant.

Edward M. Hammond submitted a brief for the appellee.

BURKE, J., delivered the opinion of the Court.

By deed dated August 21st, 1909, Robert S. Davis, of Howard County, granted and conveyed to his wife, the plaintiff in this case, the real property involved in this suit.

The grant was to her during her *natural life*, "with the power to sell the same should she see fit, but if she does not, then at and after her death the said real estate shall be equally divided among my children living at the death of my said wife." Robert S. Davis is now dead, and left surviving him a number of children, two of whom are infants. His wife sold the property to the appellant on the 13th of May, 1914, for nineteen hundred and fifty dollars, and received from him the sum of fifty dollars as part payment on the purchase price. He refused to pay the balance due on the sale, and the plaintiff instituted a suit for the specific performance of the contract. The appellant answered the bill and admitted the facts alleged, but denied "that by said deed from Robert S. Davis to Isabell F. Davis the plaintiff was vested with the legal title and power to sell the property mentioned in said conveyance, and therefore denies that the plaintiff is able to give him a good and merchantable title in accordance with the contract of sale filed as 'Plaintiff's Exhibit No. 2.'"

The power of the plaintiff under the terms of the deed to convey a good and merchantable title is the only question raised by the pleadings and is the only one we decide. The case was submitted to the lower Court upon bill and answer, and from its decree awarding specific performance of the contract the defendant has appealed.

It is stated in the brief for the appellant that he is desirous of taking the property, but there is a question as to the power of the appellee to give him a fee simple title.

The grant was to Mrs. Davis *for life*, with a power of disposition annexed. In such case, under repeated decisions of this Court there can be no doubt of the power of the grantee to convey a good title.

In *Benesch v. Clark*, 49 Md. 497, it appeared that Nathan Bramble by his last will and testament devised and bequeathed all his property, real, personal, and mixed to his wife *during her life*. He was the owner of two houses and

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lots on Monument street in Baltimore City. The will empowered her to dispose of these "as my wife sees fit, *at her decease*." The wife was appointed sole executrix of the will and administered the estate, and died in 1877, without having married again. In 1874 she executed a deed of assignment of one of the houses on Monument street to Charles H. Hall. After the death of Mrs. Bramble, letters *de bonis non cum testamento annexo* were granted upon the estate of Nathan Bramble to Edward J. Clark and Tyson Bramble. Upon the assumption that the lot sold to Hall was not legally disposed of by the deed of Mrs. Bramble, the administrators, under the authority of the Orphans' Court, advertised and sold the lot to Isaac Benesch, who excepted to the sale upon the ground that the administrators could make no legal title to the property. The Orphans' Court overruled the exceptions and ratified the sale. Upon appeal the order was reversed upon the ground that the power of disposition given by the last will was well executed by the deed of Mrs. Bramble to Hall. The Court held that Mrs. Bramble took a life estate only in the Monument street lot sold to Hall with a power of disposition annexed, and that the power had been effectually executed by the deed of assignment to him.

In *Marden v. Leimbach*, 115 Md. 206, the principle announced in *Benesch v. Clark* was applied to the construction of a deed.

As we are of opinion that the plaintiff is able to convey to the appellant a good and merchantable title to the property in accordance with the terms of the contract, and as that is the only question we are asked to decide, the decree appealed from will be affirmed.

The record states that the case was heard upon demurrer in the Court below, and that the demurrer was overruled, and the defendant declining to answer, the decree was passed. It is conceded that this recital is an error, and that the case was in fact heard upon bill and answer.

Decree affirmed, with costs.

THE MARYLAND TRUST COMPANY

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE,

ET AL.

Baltimore City: assessments for benefits, and damages, for public improvements; not to be in excess of actual damages and expenses.

Section 175 of Article 4 of the Public Local Laws, does not authorize the City of Baltimore, in a condemnation proceeding for opening a public highway, to assess an aggregate amount of benefits in excess of the total amount of the damages and expenses. p. 49

The Legislature did not intend to authorize the city thus to make a profit out of such improvements, and could not have validly given the city such authority. pp. 49, 52

Although the usual constitutional mandate enjoining equality and uniformity in taxation, does not generally apply to special assessments for local improvements, if a statute permitted a municipality to make such assessments in excess of the cost of the improvements and the expenses incident thereto, it would unquestionably be contrary to Article 15 of our Bill of Rights, for such assessments would require those so assessed to contribute to the support of the government, to the extent of the excess, as other taxpayers are not required to do. pp. 50-51

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As the city has no power to assess benefits which materially amount to more than the aggregate of damages and expenses, it is the duty of the Commissioners for Opening Streets to deduct the excess, if they find such, by allowing each assessment its proportion of the amount deducted. Their return should show that such deductions were made. p. 53

Upon failure of the Commissioners for Opening Streets to make such deductions, the Court can do so, on appeal to it.

p. 54

Decided January 14th, 1915.

Appeal from the Baltimore City Court. (DUFFY, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J. BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Joseph S. Goldsmith and Sylvan Hayes Lauchheimer (with whom were *Joseph C. France* and *G. H. H. Emory* on the brief), for the appellant.

S. S. Field, City Solicitor, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

This is the third appeal to this Court in reference to the assessment for alleged benefits to the owners of properties by reason of the improvements over, along and near Jones' Falls, now known as the Fallsway, made under the authority of Chapter 110 of the Act of 1910 (p. 639), and ordinances of the appellee passed under that Act. The first was that of the *P. B. & W. R. R. Co. v. Baltimore*, 121 Md. 504, and the other was that of the *Safe Deposit and Trust Co. v. Baltimore*, 121 Md. 522. In *Bond v. Baltimore*, 116 Md. 683, the Act itself and the ordinance passed in pursuance thereof were attacked, but both were sustained. The benefits assessed against the present appellant are \$94.00, and it is admitted that its property will receive benefits from the condemnation

and opening of the Fallsway to the extent of that amount. While the amount involved in this appeal is small, we are informed that it is a test case—there being about 170 appeals pending in the lower Court, some of which relate to awards of damages.

The appellant filed a petition in the lower Court in which it was alleged that the benefits assessed were largely in excess of the aggregate amount of damages and expenses and prayed the Court to “decrease, proportionately, all assessments for benefits made by said Commissioners for Opening Streets, as shown by their aforesaid return, the said assessments to be decreased to such extent that the total amount of the benefit assessments shall not exceed the aggregate amount of the damages and expenses, to wit, the sum of \$135,835.14.”

The Court refused to grant that prayer of the petition, and an exception was taken to that ruling, which constitutes the first bill of exceptions. The appellant offered a prayer, which was refused, but we understand the exception taken to that ruling is not pressed. The Court granted two prayers offered by the City, which are as follows: First, “The Court rules as a matter of law, that it being admitted by agreement of counsel that the petitioner’s property is actually benefited by the opening of the Fallsway to the amount of \$94.00, the inquisition of the Court sitting as a jury should be for the sum of \$94.00 benefits in this case.” The second was, “The Court rules as a matter of law that it is impossible now to ascertain the total damages and expenses of opening the Fallsway, and therefore the Court can not cut down the benefits upon the petitioner, upon the contention that the aggregate benefits exceed the total damages and expenses.” The appellant excepted to the granting of those prayers, and the action of the Court in granting them is presented by the second bill of exceptions.

The City’s position is that, it being admitted that the appellant’s property was benefited to the amount of the assessment, it makes no difference to the appellant whether the

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aggregate benefits assessed exceed or fall short of the cost of the improvement, because the appellant can not be injured so long as its assessment does not exceed the actual benefit received by it. It also denies that the aggregate of the benefits assessed in this case exceeds the real cost of the improvement, and contends that no means are provided by law for doing what the petitioner asked the Court below to do. As the principal question argued, which we understand to be involved in all of the appeals in the lower Court on benefits, is whether under the Baltimore Charter the benefits can exceed the damages and expenses, we will first consider that.

As decisions already rendered by this Court on the subject can not be properly understood, unless we examine the statutes in force when they were made, it will be necessary to refer to them at some length. *Alexander v. Baltimore*, 5 Gill, 383, is a leading case. The Act of 1838, Chapter 226, gave the Mayor and City Council of Baltimore power to provide for laying out, opening, extending, etc., in whole or part, any street, etc., within the bounds of the city; to provide for ascertaining whether any, and what amount in value of damages will be caused thereby, and what amount of benefit will thereby accrue to the owner, etc., of any ground within or adjacent to the city, for which such owner ought to be compensated, or ought to pay compensation, "and to provide for assessing and levying, either generally on the whole assessable property of said city, or specially on the property of persons benefited, the whole or any part of the amount of damages and expenses which they shall ascertain will be incurred in locating, opening * * * any street, square, lane or alley within said city." An ordinance (No. 10) of the city, passed March 9th, 1841, to carry into effect the powers granted by the statute, directed the Commissioners, after ascertaining the amount of damages and expenses to be incurred in any case, to assess the same on all the ground and improvements within the city, the owners of which, as such, the Commissioners decided to be benefited—apportioning them in just propor-

tion, according to the value of the benefit, etc. The Act and ordinance were sustained in that case.

We do not understand it to be denied by the City Solicitor that under that Act the aggregate of benefits assessed could not exceed the total cost of the improvement, but his contention is that originally by an ordinance of 1866 (No. 26; approved April 3, of that year), and afterwards by the present charter (Act of 1898, Chapter 123), the provision was changed, and that now the Commissioners for Opening Streets are no longer limited in making assessments for benefits to the aggregate of damages and expenses. We will quote from that Act later. He further contends that the question has been settled by the decisions of this Court. The case of *Hawley v. Baltimore*, 33 Md. 270, is the principal one relied on. Expressions used in that opinion, if taken alone, might furnish some ground for that contention, but a careful examination of the whole opinion and the ordinance referred to in it, will show conclusively that it was not meant to decide, and the Court did not decide, what is now contended for. It is said that the ordinance of 1866, which was under consideration in *Hawley's case*, changed the law in force when *Alexander v. Baltimore* was decided, but while it is true it did make some changes in existing ordinances, it is equally true that it did not, as to affect the question now under consideration, and, moreover, that it could not have done so. The statute in force when *Hawley's case* was decided, and when the ordinance of 1866 was passed, was section 837 of Article 4 of the Local Code of 1860. The provisions in respect to this question were the same as in the Act of 1838. Indeed, that statute is precisely the same in the Code of 1888, Article 4, section 806, excepting the Act of 1878, Chapter 143, provided that the appeals authorized should be taken to the Baltimore City Court, instead of to the Criminal Court or the Superior Court as the Code of 1860 directed and it so continued until the Act of 1898. By it, as we have seen, the City was authorized, "to provide for

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assessing and levying, either generally on the whole assessable property of said city, or specially on the property of persons benefited, the *whole or any part* of the amount of damages and expenses, which they shall ascertain will be incurred," etc.

Manifestly the city could not, under that power, assess and collect benefits for *more than the whole* amount of damages and expenses, for the simple reason that it was limited to "*the whole or any part.*" And if the ordinance of 1866 had attempted to do so it would have been invalid, but the change made by that ordinance was that, instead of requiring the benefits to be so apportioned as to cover the whole amount of damages and expenses, it simply authorized the assessment of the direct benefits each one received, and if there was any deficiency the city was required to pay it. So when we find in *Hawley's case* the statement that "the Commissioners, whose duty it is to assess benefits arising from the opening of the streets, are authorized in making such assessment to assess only the *direct benefits*; these are such as actually and substantially accrue to the property holder, and are to be made without reference to the costs and expenses of opening the street," it can not be properly said, that the Court intended by that language to hold that the city could do what even a cursory reading of its charter powers before the Court would show it was not authorized to do. The Court was speaking with reference to the case before it, and the facts were that the Commissioners awarded the amount estimated as damages to Philip Hiss, and assessed upon all the adjacent ground and improvements certain sums amounting in the aggregate to a sum equal to the estimated damages and expenses for benefits, as will be seen by the report of the case. There was no such question as that now being considered before the Court. The opinion went on to say, "The ordinance alluded to changed the old system of assessment, under which the benefits assessed were required to be so apportioned as to cover the whole amount of expenses in-

curred. Then each party assessed had an interest in the assessment of another, whether for benefits or damages. But under the present ordinance, no such interest exists. Each assessment must stand upon its own merits. The benefits assessed *are not required to cover the expenses* of opening a street." If the City could have assessed "specially on the property of persons benefited" more than the damages and expenses, why could it not have assessed more, under the other provision in the statute "on the whole assessable property of said city"? Yet will anyone say that if the amount of the damages and expenses of an improvement had been ascertained to be \$10,000.00, the city could have levied \$15,000.00 for that improvement? The Court only meant to say, what we have in effect since said, that under that ordinance the jury only passed on the assessment for benefits (when they were considering benefits) which had accrued to the particular property before them, and they were to assess such direct benefits as accrued, and not, as they would have done under the former ordinance, apportion the whole amount of damages and expenses between all of the properties benefited. But whether the aggregate of benefits could exceed the aggregate of damages and expenses was not raised or suggested, and hence there was no occasion to pass on it.

Zion Church v. Baltimore, 71 Md. 524, also cited by the appellee, simply decided that it was immaterial who held the title, as the assessment was made on the property without any reference to the state of the title. Nor is there anything in *Friedenwald v. Baltimore*, 74 Md. 116, which sustains the City's contention. That case decided that each owner of property affected had the right to a separate trial, and it was error to consolidate the twenty appeals, over the objection of the owners of property assessed for benefits. The Court concluded by saying: "Under the system now in force in Baltimore City, 'each assessment must stand upon its own merits.' It was so held in *Hawley's case*, where it is said: 'The benefits assessed are not required to cover the expenses of

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opening a street. So far as they may go, they are to be appropriated to that purpose, but any deficiency in the amount is required to be paid by the city.' ” There is no suggestion of a right in the city to assess more benefits in the aggregate than the damages and expenses. In the excellent work of Mr. Ritchie on the “*Laws of Municipal Condemnation in Maryland*,” in section 130, he refers to *Hawley v. City* and *Friedenwald v. City*, and what he says is a correct statement based on those authorities, but he was not considering or referring to such a question as we now have before us, and of course expressed no opinion on it.

We said in *Baltimore v. Smith & Schwarz Co.*, 80 Md. 458, that: “It seems clear that the two transactions of fixing damages or compensation, and of assessing benefits, are separate and distinct.” We held that under the law as it then stood, an appeal from the amount of benefits assessed did not even bring up for review the damages allowed the same property owner—each case was on appeal to be tried separately, and the amount of damages or benefits, as the case might be, determined separately. But there is nothing in that case which intimates that the benefits in the aggregate can exceed the damages and expenses. As we have said in speaking of *Hawley’s Case*, the statute, of course, would not have permitted it, if it had been attempted, regardless of the further objection whether such a statute could be validly passed. When that case was decided, the Act of 1878, Chapter 143 (Code of 1888, section 806), was in force. The decision therefore could not have meant that the benefits could, in the aggregate, exceed the damages and expenses, and no such question was suggested. On the contrary, the opinion itself shows that the benefits to be reviewed were only intended to be equal to the damages and expenses. After saying that the commissioners were required to fix the compensation to be paid to the owners for the ground or improvements to be taken, we continued: “They then ascertain the aggregate of such damages or compensation, and having

added the estimated expenses of the proceedings, they are prepared to furnish the city *with the cost of opening the street*. That part of their work is completed (subject, of course, to their right of revision, appeal, etc., as provided by the ordinance). The next step taken is to determine *where the money is to come from*." Does anyone doubt *what money* was meant? In the connection it was used, it only could mean the money with which the cost of making the improvement was to be paid. And the opinion then goes on to show where it is to come from, namely, from benefits assessed, and "if there is a shortage in the benefit column, the account is balanced by the city."

There is, then, no case in this State holding, or justifying the inference, that under the charter, prior to the Act of 1898, the aggregate of benefits could exceed the aggregate of damages and expenses, and in our judgment the language of the statutes prior to 1898 is too plain to admit of any question on that subject. Such being the charter prior to the present one, what is the change in it relied on? Section 175 provides that the commissioners shall ascertain whether any and what amount of value in damage will thereby be caused to the owner for which he ought to be compensated, "and the said commissioners having ascertained the whole amount of damages for which compensation ought to be awarded, as aforesaid, and having added thereto an estimate of the probable amount of expenses which will be incurred by them in the performance of the duties required of them, as aforesaid; and also of the expenses incurred by the City Register by reason of said proceedings, shall proceed to assess all the ground and improvements within and adjacent to the city, the owners of which, as such, the said commissioners shall decide and deem to be directly benefited by accomplishing the object authorized in the ordinance aforesaid; and should the direct benefits, assessed as aforesaid, not be equal to the damages and expenses incurred, the balance of said expenses and damages shall be paid by the City Register, and provided for in the general levy."

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It seems to us that to give that section the meaning contended for by the city would require us to go much further than either the history of such legislation or the language of this particular statute justifies. It must be conceded that it would work a most radical change in the proceedings by the Commissioners for Opening Streets. If it was intended to do what is claimed it did do, we know of no similar statute in this State, and have found none in the many authorities we have examined. The framers of that charter, who were amongst the most capable men of their day, were careful to provide for cases where the benefits were not equal to the damages and expenses incurred, and yet, if they had in view the probability or possibility of the amount of benefits in excess of the damages and expenses, they made no provision for what was to be done with the excess. Surely they would not have overlooked such an important matter, if they had intended to authorize such assessments. But they required the commissioners to *first* ascertain the whole amount of damages, the probable amount of expenses incurred by them, and the expenses incurred by the City Register, and *then* to proceed to assess the benefits—we say that because the section says, “and the said Commissioners *having ascertained* the whole amount * * * *shall proceed* to assess,” etc. That strongly tends to show that it was assumed by the Charter Commission and the Legislature that the benefits would not exceed the damages and expenses—at least, that they never contemplated that such excess of benefits could be recovered. Without further discussing it, we are of the opinion that that section did not intend to authorize the amount of benefits to be in excess of the damages and expenses.

But we do not stop there, for we are satisfied that the Legislature not only did not intend to do so, but could not have validly authorized the city to thus make a profit out of such improvements. It would be contrary to every principle upon which the right to assess for benefits has been

sustained, and, so far as we have found, the authorities are unanimous against such contention, when rightly understood. We will content ourselves by referring to *Cyc.* and the text-books, as in the notes many authorities are cited, which will relieve us from otherwise referring to them.

The rule is thus stated: "Where the final estimate of the cost of an improvement has been made and approved, an assessment in excess of such estimate is invalid. If the cost of the work proves to be less than such final estimate and assessment, the assessment should be reduced accordingly." 28 *Cyc.* 1155. "It is plain that an assessment should not exceed the whole cost of the work for which the assessment is laid. Any substantial excess of assessment over cost would be general taxation of the particular district in disregard of all mandates of equality. A law which should direct or inevitably compel such a result would doubtless be held void anywhere in the United States as an act of confiscation." *Gray on Limitations of the Taxing Powers*, section 1883. "While an assessment is levied upon the theory of benefits to the property conferred by the public improvements in which the assessment is levied, it is also, in theory, levied for the cost of such improvement. Accordingly, if the benefits exceed the cost, the assessment can only be for the actual cost of the work, together with the proper items incident thereto." 1 *Page & Jones on Taxation by Assessment*, section 466. "The assessment can only be levied for the actual cost of the improvement, and the local authorities can not include in the assessment the expense of any other work than such as is necessary to complete the particular improvement in a reasonable and fair mode." 2 *Roads & Streets* (Elliott) (3 ed.), section 715.

Although the usual constitutional mandate enjoining equality and uniformity in taxation does not generally apply to special assessments for local improvements, if a statute permitted a municipality to make such assessments in excess of the cost of the improvements, and the expenses incident

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thereto, it would unquestionably be contrary to Article 15 of our Bill of Rights, for such assessments would require those so assessed to contribute to the support of the government, to the extent of the excess, as other taxpayers are not required to do.

If we seek for expressions in opinions in this State, reflecting upon the subject, they are not wholly wanting, although the precise question has never been in this Court before. In *Alexander v. Baltimore*, *supra*, CHIEF JUDGE ARCHER, who sat in the lower Court and was affirmed, said, in considering the validity of laws assessing benefits for improvements: "It is not perceived that the assessment of benefits *equivalent* to damages, if, in fact, the benefits are equal to the damages, on particular districts benefited, can be objectionable." In *Baltimore v. Greenmount Cemetery*, 7 Md. 517, where it was contended that the Cemetery Company was exempt from a paving tax, under its charter, which provided that the cemetery, "so long as used as such, shall not be liable to any tax or public imposition whatever," CHIEF JUDGE LEGRAND said: "We think the Legislature intended nothing more than to exempt the property of the proprietors from all taxes or impositions levied or imposed for the *purpose of revenue*, and not to relieve it from such charges as are inseparably incident to its location in regard to other property." Under the city's contention, although the Cemetery Company would be exempt from taxes imposed for the purpose of revenue, yet it could indirectly be required to pay for that purpose, if some of the benefits assessed for public improvements were to go into the city treasury. In *Brooks v. Baltimore*, 48 Md. 265, property outside of the city was held liable for benefits on account of an improvement within the city limits.

The Court said: "We have failed to find any constitutional prohibition upon the exercise of this power by the Legislature. Was it a tax, which had been imposed, to be contributed for the support of the municipal government, it would be other-

wise." Yet is it to be said, that the Legislature did, or could authorize the city to indirectly impose upon the property of Mr. Brooks, which was located outside of the city, a tax for the support of the municipal government, under the name of benefits, when it could not have laid a tax on that property for such purposes?

Our conclusion is that the Legislature has not authorized, and could not authorize the city to assess benefits for such an improvement in excess of the aggregate of damages and expenses. Of course we refer to a substantial excess, and not a matter of merely a few dollars, as it might in many cases be impracticable or impossible to avoid such a difference. It only remains to pass on the rulings of the Court, and then determine how relief can be obtained, if in point of fact the benefits will exceed the damages and expenses in making this improvement. We have no means of determining that question of fact under present conditions, and therefore will express no opinion on it, but notwithstanding what we have said, we must affirm the action of the lower Court. It is admitted in the record that there are now pending in that Court about 170 appeals from the return of the Commissioners, some of which relate to awards of damages. It is therefore impossible to now know what the result will be when the appeals are all determined. It will have to be decided what benefits each one should be assessed with, regardless of what others are, or what the damages and expenses amount to. The question to be determined in a benefit case is what benefits have accrued to the particular property. The amount of damages may also be changed at the trial of all or some of the damage appeals. The prayer of the petitioner referred to above was therefore properly refused, and the two prayers offered by the city were properly granted. But nevertheless, if after all of the cases are determined, and it is then known what the aggregate of damages and expenses is, and what the aggregate of all assessments of benefits is, the latter exceeds the former, then the proper proportion of the excess should be deducted from the benefits charged each

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one. For example, to take a simple illustration, if the total damages and expenses are \$225,000.00 and the total benefits assessed are \$300,000.00, there would be an excess of \$75,000.00, which would be one-fourth of the total benefits. In such case the Court should deduct one-fourth of each assessment of benefits—that is to say, a property assessed with \$3,000.00, would be entitled to a reduction of \$750.00, and so on.

Inasmuch as the city has in our judgment no power to assess benefits which materially amount to more than the aggregate of damages and expenses, it is the duty of the Commissioners to deduct the excess, if they find such, by allowing each assessment its proportion of the amount deducted. Their return should, of course, show that such deductions were made. We think that section 177 would authorize that, as they “shall make all such corrections and alterations in the valuations, assessments and estimates, and all other matters contained in the said statements and explanatory map or maps aforesaid, as in their judgment shall appear to them, or a majority of them, to be just and proper * * *; and after closing such review the Commissioners shall make all such corrections in their statement and explanatory map or maps as they shall deem proper, and cause such statement as corrected to be recorded in their book of proceedings,” etc. They then deposit the book of proceedings and maps in the office of the City Register, and after certain notices provided for, section 179 authorizes appeals by the city or any person or corporation dissatisfied with the assessment of damages or benefits. On appeal the Court directs the clerk to issue a *subpoena duces tecum* to the City Register, requiring him to produce and deliver to the Court the record of the proceedings of the Commissioners in the case, and all maps, plats, documents and papers connected with such record, “and the said City Court shall have full power to hear and fully examine the subject and decide on the said appeal * * * and may require the said Commissioners, their clerk, surveyor, or other agents and servants, or any of them,

and all such other persons as the Court shall deem necessary, to attend and examine them on oath or affirmation, and may permit and require all such explanations, amendments and additions to be made to and of the said record of the proceedings as the said Court shall deem requisite."

As it is impossible to tell in such a case as this whether the benefits will exceed the damages and expenses, and if so to what extent, until all of the cases are finally settled, we can find no better way of disposing of the question. Section 179 certainly confers upon the Court large powers, and the object is to do justice to all. In addition to what we have already quoted, that section has the following important provision in it: "and the said Court shall not reject or set aside the record of the proceedings of the said Commissioners for any defect or omission in either form or substance, but shall amend or supply all such defects and omissions, and increase or reduce the amount of damages and benefits assessed, and alter, modify and correct the said return of proceedings in all or any of its parts, as the said Court shall deem just and proper." As, then, in a case where the benefits materially exceed the damages and expenses, the Commissioners should make the reduction, upon their failure to do so, the Court can do so on appeals to it.

We have not considered the question as to what can be and what cannot be allowed as damages and expenses, because it is not before us. This is a very peculiar case. Undoubtedly the city has spent very large sums of money in improving Jones' Falls, but how much and what can properly be charged to the Fallsway we have no means of determining from this record.

Rulings affirmed, with costs.

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Syllabus

JAMES F. THRIFT, COMPTROLLER,

vs.

PHILIP D. LAIRD.

Constitutional law: limit of salaries; section 1 of Article 15; applies only to fee officers. Baltimore City: power of Legislature over—; Public Service Commission; part of salary to be paid by Baltimore City; —as to “city employees.” Article 35 of the Bill of Rights: “holding more than one office.” Statutes: titles of. Constitution, Article 3, section 29.

Section 1 of Article 15 of the Constitution, limiting the amount of compensation public officers may receive, does not prohibit the General Assembly from creating salaried officers with pay in excess of \$3,000. p. 63

This section applies only to that class of officers whose pay or compensation is derived from fees which they are entitled by law to receive for the performance of their official duties. p. 63

The power of the Legislature over the City of Baltimore is not absolute and unlimited, but while it must deal with the city in subordination to the restraints and limitations of the Constitution, the Legislature possesses wide powers of control and legislation over it. p. 67

The Legislature has the right, by law, to impose upon the city a portion of the burden of the expense of supporting the Public Service Commission, a large part of whose work is mainly for the benefit of the city. p. 67

The Public Service Commission Act, Chapter 180 of the Acts of 1910, in fixing the salaries of the commissioners at \$3,000 to be paid by the State, and an additional \$3,000 to be paid by the City of Baltimore, as to city employees, does not violate Article 35 of the Declaration of Rights, declaring that no person shall hold at the same time more than one office of profit or trust. p. 69

The Public Service Commission Act, Chapter 180 of the Acts of 1910, providing for an additional payment to be made to the Commissioners as employees of the city, is not invalid because of any defect in title, under section 29 of Article 3 of the Constitution. pp. 69-70

While that section is mandatory, it is to be liberally construed. p. 70

While under it the title must indicate the subject, it need not give an abstract of the Act, nor need it mention the means and methods by which the general purpose is to be accomplished. p. 70

Every presumption favors the validity of a statute; it can not be stricken down as void, unless it plainly contravenes some provision of the Constitution; a reasonable doubt in its favor is enough to sustain it. p. 70

The party assailing a statute must point out the special provision of the Constitution to which it is obnoxious. p. 70

Plenary power is in the Legislature for all purposes of civil government, is the rule. p. 70

In general, except where the State or Federal Constitution, has imposed limits upon the power of the Legislature, it must be considered as practically unlimited. p. 70

A somewhat different rule prevails, however, in Maryland. p. 70

Decided January 14th, 1915.

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Appeal from the Superior Court of Baltimore City. (DOB-
LER, J.)

The cause was argued before BOYD, C. J., BRISCOE,
BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

S. S. Field, City Solicitor, for the appellant.

*W. Cabell Bruce, General Counsel for the Public Service
Commission* (with whom was *Albert C. Ritchie, Assistant
Counsel*, on the brief), for the appellee.

By leave of Court, *Edward M. Hammond* and *Wm. W.
Beck* filed a brief on behalf of the State Tax Commisisoners
of Maryland.

BURKE, J., delivered the opinion of the Court.

A Public Service Commission was created and established
by the Act of 1910, Chapter 180, p. 338. It is known as the
"Public Service Commission Law." The title of the Act is as
follows: "An Act to create and establish a Public Service
Commission, and prescribing its powers and duties, and to
provide for the regulation and control of Public Service
Corporations and Public Utilities, and making appropriations
therefor." The second section of the Act provided for the
appointment, qualification, tenure of office, and salaries of
the members of the Commission, which was to consist of
three persons. This section further declared that: "The
salary of each commissioner shall be three thousand dollars
(\$3,000.00) per annum, payable out of the State Treasury
of the State of Maryland; and in addition to said sum of
three thousand dollars per annum, the chairman of said
Commission shall also receive the sum of three thousand dol-
lare (\$3,000.00) per annum, which shall be paid out of its
funds by the Mayor and City Council of Baltimore to said
chairman of said Commission as an employee of said munic-
ipal corporation; and each of the other two commissioners
shall receive, in addition to said three thousand dollars per

annum aforesaid, the sum of two thousand dollars (\$2,000) per annum, which shall be paid out of its funds by the Mayor and City Council of Baltimore to each of said other two commissioners, as employees of said municipal corporation."

The Act made it the duty of the Governor, upon the recommendation of the Commission, to appoint an attorney at law of the State of Maryland to be and act as the general counsel to the Commission at an annual salary of three thousand dollars, and it was further provided by section 2, that "the general counsel shall also receive, as additional compensation, the sum of eighteen hundred dollars per annum, which shall be paid out of its funds by the Mayor and City Council of Baltimore to said general counsel, as an employee of said municipal corporation." The Act imposed the duty upon the Mayor and City Council of Baltimore and directed and required it "to pay out of its funds the salaries and compensations provided and prescribed by this Act to be paid by it, and it shall pay said salaries and compensations to the said several commissioners and general counsel of said Commission in monthly instalments, payable at the same time and in the same manner in all respects as the salary and compensation of the Mayor of said municipal corporation is paid to him by it."

By the general ordinance of estimates for the year 1914, which was approved by the Mayor on the 15th of December, 1913, the Mayor and City Council made appropriation for the payment of the salaries and compensations provided and prescribed by the Act in this form: "The Public Service Commission (subject to the opinion of the city solicitor as to the legality of the law), eight thousand eight hundred dollars (\$8,800.00)." The Mayor and City Council paid in bi-monthly installments of \$125.00 to the chairman, and \$83.33 to each of the other two members of the Commission, and \$75.00 to the general counsel, until the 29th day of May, 1914, the several respective sums made payable by the City

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under section 2 of the Act. On that date the pay-roll of the Commission was presented to the comptroller, James F. Thrift, for his warrant for the payment by the city register of Baltimore City, at the same time and in the same manner as the salary of the Mayor is paid, for the respective sums payable on the first day of June, 1914, for the period between the 15th day of May, 1914, and the 1st day of June, 1914. The comptroller refused to give his warrant, and returned the pay-roll to the Commission, and stated that he did so upon the advice of the city solicitor, who had previously advised the Mayor that the provisions of the Public Service Commission Law imposing a part of the salary of members of the Commission upon the Mayor and City Council of Baltimore were null and void, and should not be obeyed by the comptroller or any other official of the municipality.

The appellee was then the chairman of the Public Service Commission, and there was due him by the Mayor and City Council of Baltimore under the provisions of the Act the sum of \$125.00, and if the provisions to which reference has been made, and which imposed upon the City a portion of the salaries of the members of the Commission and its general counsel are valid, it was the clear and imperative duty of the City to have paid the appellee the sum due. Upon the refusal of the comptroller to issue his warrant for the payment of said sum, the appellee, on the first day of July, 1914, instituted an action of mandamus in the Superior Court of Baltimore City against the comptroller in which he prayed that James F. Thrift, the comptroller of Baltimore City, be commanded "to draw his warrant in the usual manner upon the city register for the payment to your petitioner out of the treasury of the Mayor and City Council of Baltimore of the bi-monthly instalment of salary which became due to him as aforesaid on the first day of June in the year 1914, for the period between the fifteenth day of May, in the

year 1914, and the first day of June, in the year 1914, that is to say, the sum of \$125.00."

The comptroller answered the petition, and set out fully the reasons why the order should not be granted. Briefly, but substantially stated, these reasons are that those provisions of the Act which imposed the obligation upon the Mayor and City Council to pay the respective sums therein specified were null and void: First, because they violated section 1, Article 15 of the Constitution of Maryland; secondly, because the Act of 1910, Chapter 180, contravenes section 29, Article 3 of the Constitution; thirdly, because the Act is a violation of the Fourteenth Amendment of the Constitution of the United States, in that it attempts to deprive the City of Baltimore, and its tax-payers who furnish its funds, of its property without due process of law; and fourthly, that if the expression in the Act of 1910, Chapter 180, that the chairman of the Public Service Commission should receive \$3,000 and each of the other members \$2,000 and the general counsel \$1,800 per annum, "which shall be paid out of its funds by the Mayor and City Council of Baltimore, as employees of said municipal corporation," were to be construed to make said chairman, members and general counsel city employees, then the provisions would be null and void under Article 35 of the Declaration of Rights.

The appellee demurred to the answer, and the Court, after full argument, sustained the demurrer. The appellant, as stated in the record, "waived leave to amend his answer," and the Court on the 21st day of September, 1914, ordered the writ of mandamus to issue as prayed. From this order the comptroller has prosecuted this appeal.

It is to be observed that the Act allows to each commissioner a salary of \$3,000 payable by the State, and in addition the sums specified in the Act payable by the Mayor and City Council of Baltimore. The office of Public Service Commissioner is, therefore, a statutory office with a salary attached in excess of \$3,000. The main question in the case

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is whether it is within the power of the Legislature to attach to an office of statutory creation a larger salary than \$3,000. This the Legislature has done with respect to this office, and we will now proceed to consider the reasons urged against the constitutionality of its act. These reasons will be considered in the following order: Does the Act violate section 1, Article 15 of the Constitution? That section is here transcribed:

“Every person holding any office created by, or existing under the Constitution or laws of the State (except Justices of the Peace, Constables and Coroners), or holding any appointment under any Court of this State, whose pay or compensation is derived from fees or moneys coming into his hands for the discharge of his official duties, or in any way growing out of or connected with his office, shall keep a book in which shall be entered every sum or sums of money received by him, or on his account, as a payment or compensation for his performance of official duties, a copy of which entries in said book, verified by the oath of the officer by whom it is directed to be kept, shall be returned yearly to the Comptroller of the State for his inspection, and that of the General Assembly of the State, to which the Comptroller shall, at each regular session thereof, make a report showing what officers have complied with this section; and each of the said officers, when the amount received by him for the year shall exceed the sum which he is by law entitled to retain as his salary or compensation for the discharge of his duties, and for the expenses of his office, shall yearly pay over to the Treasurer of the State, the amount of such excess, subject to such disposition thereof as the General Assembly may direct; if any of such officers shall fail to comply with the requisitions of this section for the period of thirty days after the expiration of each and every year of his office, such officer shall be deemed to have vacated his office, and the Governor

shall declare the same vacant, and the vacancy therein shall be filled as in the case of vacancy for any other cause, and such officer shall be subject to suit by the State for the amount that ought to be paid into the treasury; and no person holding any office created by or existing under this Constitution or laws of the State, or holding any appointment under any Court in this State, shall receive more than three thousand dollars a year as a compensation for the discharge of his official duties, except in cases specially provided in this Constitution."

It is to be noted that there is no *express* prohibition in the section upon the *General Assembly* from allowing a salary in excess of \$3,000. Such a prohibition must be inferred, if at all, from this language found in the second clause of the Article: "No person holding any office * * * *shall receive* more than \$3,000." It is not claimed that such a limitation upon the power of the General Assembly is to be found in any other provision of the organic law. The whole argument upon this branch of the case must rest upon *mere* implication deduced from the language quoted. Such language is not that usually employed by the Constitution in imposing limitations upon the action of the law-making power. It has imposed such restraints in a number of instances. In sections 32, 33, 34, 35, 36, 37, 38 and 40 of Article 3 of the Constitution restraints and limitations are imposed upon the Legislature, and the language in which these prohibitions is expressed makes it evident that it was directed against legislative action. Here the prohibition is not against the action of the *General Assembly* at all, but against a *person* receiving more than \$3,000 per annum from any office, or appointment created or existing in the mode and manner stated. The question that naturally suggests itself is: Against what class of persons is this prohibition directed, and from what source was it contemplated that the money they received might be derived? One would naturally suppose that if it had been the intention of the framers of the Constitution to prohibit

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the General Assembly from creating an office with a salary attached exceeding \$3,000 they would have done so in plain, direct and simple terms, and not obscured their intention by the use of such language as that to which we have referred. That language undoubtedly does impose a limitation upon the compensation which a certain class of officers or appointees may receive, but it seems to be reasonably clear from the language of *Section 1, Article 15*, when considered in the light of its historical genesis and the accepted canons of Constitutional construction, that it does not prohibit, and was never intended to prohibit, the General Assembly from creating salaried officers whose pay should exceed \$3,000. The section was intended to apply to that class of officers whose pay or compensation was derived from fees which they were entitled to receive by law for the performance of their official duties. Thus construed the second clause of *Section 1, Article 15*, expresses in appropriate terms the intention of its framers.

Prior to the constitution of 1851 practically all officials in the State received their compensation from fees. The fee system resulted in wide-spread abuses, and occasioned general complaint throughout the State. The evils which it introduced were attempted to be remedied by the Convention of 1851. It was provided by *Article 10, Section 1* of that Constitution, that: "Every officer of this State, the Governor excepted, the entire amount of whose pay or compensation received for the discharge of his official duties shall exceed the yearly sum of three thousand dollars, shall keep a book, in which shall be entered every sum or sums of money received by him or on his account as a payment or compensation for his performance of official duties, a copy of which entries in said book, verified by the oath of the officer by whom it is directed to be kept, shall be returned yearly to the treasurer of the State for his inspection and that of the general assembly of Maryland; and each of such officers, when the amount received by him for the year shall exceed the sum of three thousand dollars, shall yearly pay over to the

treasurer the amount of such excess by him received, subject to such disposition thereof as the Legislature may deem just and equitable. And any such officer failing to comply with the said requisition shall be deemed to have vacated his office, and be subject to suit by the State for the amount that ought to have been paid into the treasury."

Following the adoption of the Constitution of 1851 various acts of the General Assembly were passed regulating the fees to be charged by fee officers. They were codified in Article 38 of the Code of 1860, and relate to Clerks of Courts, Register of Wills, Commissioner of the Land Office, Constables, Coroners, Criers, Justices of the Peace, Sheriffs, etc.

These officers were required under the section of the Constitution just quoted to make yearly returns to the Treasurer of the State. It seems clear from the debates in the Convention upon the subject, contained in Vol. 2, that the first section of Article 10 of the Constitution was intended to apply to *fee* officers, and not to *salaried* officers. The intention of the framers of the Constitutional Convention of 1864 upon the subject is more clearly manifested by the debates in that convention.

When the report of the committee on the schedule, which embraced in substance a transcript of *Section 1, Article 10*, of the Constitution of 1851, was before the convention for consideration, Mr. Henry Stockbridge moved to strike out from the first line the words, "Every officer of this State," and to substitute in lieu thereof the words, "*Every person holding any office created by or existing under the Constitution or laws of this State.*" This amendment was adopted, and the language in which the amendment was proposed appears in *Section 1, Article 12* of the Constitution of 1864, and also in *Section 1, Article 15* of the present Constitution. A motion was made, and failed, to reconsider the vote by which the amendment was adopted. The debate which ensued (Vol. 3, page 1698) makes it plain that the section of the Constitution was intended to apply to *fee offices only*. As the amendment was adopted and was incorporated in the

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Constitution, we quote the following short extract from the debates which is sufficient to manifest its object and purpose, and the reason for its adoption :

“Mr. Ridgely: I wish to call the attention of the gentleman from Baltimore City (Mr. Stockbridge) to the amendment he first offered. I am afraid it goes very much beyond what my colleague intends. The expression ‘every person holding any office created by, or existing under the Constitution or laws of the State,’ includes all the municipal officers of the City of Baltimore, I think. If the City of Baltimore choose to pay them more than three thousand dollars it is no business of ours. If the City of Baltimore pays a man four thousand dollars, why should we take one thousand dollars out of his pocket and put it into the State Treasury? It puts a restriction upon the City of Baltimore, that it shall not pay the city clerk or any other officer a higher salary than three thousand dollars. That is none of our business, if the people choose to pay more. They have not done so, so far as I am aware. I hope the house will reconsider its action on that amendment if the gentleman construes it as I do, to cover all offices.

“Mr. Abbott: The reason why I voted in favor of the amendment was that I was not aware in doing so that it would affect the corporation officers. If it does, I hope the gentleman will change the language of it.

“Mr. Stirling: It may be so construed, for the officers of Baltimore City are officers under the laws of this State.

“Mr. Stockbridge: If it is in order to offer an explanation, I will tell exactly what I meant. There have been certain officers, I may instance certain clerks, sheriffs, criers, officers about the courts in the State of Maryland, who have received fees to an amount larger than three thousand dollars, year after year, and have said that they were not officers of the State; that they were officers of the court. Those, in my apprehension, are just the sort of persons designed to be

reached by this. When persons have a fixed salary, it is known; but there are none that have a fixed salary by the State that are obnoxious to this, either in the former constitution or as modified by the amendment. It was designed to meet just such cases and no others, where the fees and contingent emoluments of the office amount to more than three thousand dollars. *The design is that in all such cases the excess should go to the State.*"

The first clause of *Section 1, Article 15* of the Constitution of 1867, in most of its important provisions, is taken from the Constitution of 1851 and 1864 upon the same subject. It applies in terms to all fee officers, except Justices of the Peace, Constables and Coroners. Its language appears to have been carefully selected to embrace all such officers—and they were many,—*holding* any office created by or existing under *the* Constitution or laws of the State, whose pay or compensation is derived from fees or money coming into his hands from the discharge of his official duties, etc. The language of the second clause is more comprehensive and would include every fee office thereafter created. The prohibition in this clause is upon any person holding any office * * * under *this* Constitution, etc. The terms of both clauses are sufficiently broad and comprehensive to embrace all fee officers then or thereafter created, "except in cases specially provided for in this Constitution." There were *fee officers* provided for by the Constitution of 1867, who were permitted by that Constitution to receive from fees more than \$3,000 per annum, as compensation for the discharge of their duties, to wit: The Clerks of the Courts and Register of Wills of Baltimore City. These officers, who were allowed to receive \$3,500 per annum, are *excepted cases specially provided in the Constitution.*

Does the Act violate the Fourteenth Amendment to the Federal Constitution? It is said that the imposition of a portion of the salaries of the members of the Commission upon the City is the taking of its private property without

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due process of law. The power of the Legislature over the City, it is true, is not absolute and unlimited; *Baltimore v. State*, 15 Md. 463; *Pumphrey v. Baltimore*, 47 Md. 152; *Talbott Co. v. Queen Anne Co.*, 50 Md. 259; and while it must deal with the City in subordination to the restraints and limitations of the Constitution, it does possess wide powers of control and legislation over it. We find no restraint in the Constitution itself against the imposition upon the City of a portion of the burden of the expense of supporting the Commission. Most of the important public service corporations and public utilities are located in the City, and the Legislature doubtless thought that the people of the municipality, who were most largely interested in the regulation and control of these corporations, would be the principal beneficiary of the work of the Commission, and for that reason imposed a part of the costs of its maintenance upon the City. Its power to do that—and that is the only question we are to determine—finds support in the cases of *Baltimore v. State*, *supra*; *Revell v. Annapolis*, 81 Md. 1; *Mobile v. Kimball et al.*, 102 U. S. 691 (L. Ed.); *Daly v. Morgan*, 69 Md. 460.

In *Revell case*, *supra*, it appeared that the Act of 1894. Chapter 620, required the building of a public school house in the City of Annapolis, and apportioned the cost of its construction between the County and the City. In discussing the power of the Legislature to do this, JUDGE ROBINSON said: "We recognize the force of the argument that the question whether a municipal debt is to be created ought to be left to the discretion and judgment of the people who are to bear the burden. We recognize, too, the fact that the exercise of this power by the Legislature may be liable to abuse. But the abuse of a power is no argument against its exercise. The remedy, however, in such cases, is with the people, to whom the members of the Legislature are responsible for the discharge of the trust committed to them. It is a matter over which the courts have no control. If the debt

to be created was for a private purpose that would present a different question, for it is a fundamental principle, inherent in the nature of taxation itself, that all burdens and taxes shall be levied for public and not for private purposes. Be that as it may, it is well settled in this State that the Legislature has the power to compel a municipal corporation to levy a tax or incur a debt for a public purpose, and one within the ordinary functions of a municipal government.

In *Pumphrey's case*, 47 Md. 145, a mandamus was sued out to compel the Mayor and City Council of Baltimore to purchase a bridge over Gwynn's Falls, within the corporate limits, as directed by the Act of 1876; and the Court held that it was the duty of the City to build and keep in repair bridges over its highways, and that the Legislature had the power to compel it to buy a bridge already constructed.

And in *Mayor and C. C. of Balto. v. Reitz*, 50 Md. 574, it was decided that the Legislature had the power to compel the city authorities to acquire by condemnation a lot of ground in said city to be used as a public square or park. Again in *County Comrs. of Talbot County v. County Comrs. of Queen Anne's Co.*, 50 Md. 245, it was held that the Legislature had the power to compel the Commissioners of Talbot County to levy a tax to pay one-half of the expense of building a bridge over "Kent Island narrows," and on the ground that the bridge was a public improvement of special interest and advantage to that county.

And we may here add that the case of the *Commissioners of Revenue v. State*, 45 Ala. 399, which was so much criticised in the argument and which is also criticised by Judge Cooley, in his *Constitutional Limitations*, has, since the publication of the latter work, been confirmed without dissent by the Supreme Court of the U. S. *County of Mobile v. Kimball*, 102 U. S. 691. In that case the Legislature of Alabama appointed a Board of Harbor Commissioners for the purpose of deepening and improving the bay of Mobile, and directed that the Commissioners of Revenue for the County of Mobile

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should issue coupons of the county and deliver the same to the Harbor Commissioners to be sold and the proceeds applied in payment of the expenditure. On application for a mandamus to compel the Commissioners of Revenue to issue the bonds, the Supreme Court held that the Act was a valid exercise of legislative power. Referring to the Act, MR. JUSTICE FIELD says: "Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the Legislature, unless restricted by constitutional provisions, to determine in what manner the means to defray its costs shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited."

We do not find that the Act offends against Article 35 of the Declaration of Rights, which declares that "no person shall hold, at the same time, more than one office of profit or trust created by the Constitution or laws of this State." The Act creates *one indivisible office*, and whatever the Legislature may have meant by the use of the words "as an employee of said municipal corporation," when referring to the additional payment by the City to the Commission and its general counsel, it is evident that it did not intend thereby to constitute them municipal officers of the City.

Having reached the conclusion that the Act is not invalid for any of the reasons considered, there ought not be any serious contention that its title is insufficient under section 3, Article 29 of the Constitution. The title gave notice that the Legislature proposed to create and establish a Public Service Commission, and to make appropriations therefor. Every person was chargeable with the notice, conveyed by the title, that it might make these appropriations in any manner it saw fit within its constitutional power, and having made them in

the way it had the power to do, the notice given was a sufficient compliance with the requirements of the Constitution. On account of the great importance of the case—affecting as it does the salaries of so many public officers—we have given each question presented by the record our careful consideration, and our conclusion is that the Act of 1910, Chapter 180, is not invalid for any of the reasons urged against it.

In reaching this conclusion we have recognized and applied the well-settled canons of construction:

First—That every presumption favors the validity of the statute; it cannot be stricken down as void unless it plainly contravenes some provision of the Constitution; a reasonable doubt as to its constitutionality is sufficient to sustain it, and the party assailing the Act must point out the special provision of the Constitution to which it is obnoxious. “Plenary power in the Legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception.” *People v. Draper*, 15 N. Y. 453; *Lewis’ App.* 67 Pa. St. 153. The general rule upon this subject is, that, except where the State or Federal Constitution has imposed limits upon the legislative power, it must be considered as practically unlimited; but this broad power appears to be subject in this State to some qualifications. *Regents, etc., v. Williams*, 9 G. & J. 408; *Baltimore v. State*. 15 Md. 469.

Second—That section 29, Article 3 of the Constitution is mandatory; but the general disposition of the Court has been to give the section a liberal construction, so as not to interfere with or impede legislative action. The purposes of this provision of the Constitution are “to prevent the Legislature from the enactment of laws surreptitiously; to prevent ‘log rolling’ legislation; to give the people general notice of the character of the proposed legislation, so they may not be misled; to give all interested an opportunity to appear before the committees of the Legislature and to be heard upon the advisability of the proposed legislation; to advise members of

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the character of the proposed legislation, and to give each an opportunity to intelligently watch the course of the proposed bill; to guard against fraud in legislation, and against false and deceptive titles. These purposes have been so plainly announced in numerous opinions by this Court that a statement of the rule and the citation of cases would seem to be sufficient." *State v. McKinney*, 29 Montana, 375; *Davis v. State*, 7 Md. 160; *Drennen v. Banks*, 80 Md. 310; *Baltimore v. Reitz*, 50 Md. 574; *County Commissioners v. School Commissioners of Worcester County*, 113 Md. 305.

Third—That the title, whilst it must indicate the subject, need not give an abstract of the Act; nor need it mention the means and methods by which the general purpose is to be accomplished. *Catholic Cathedral v. Manning*, 72 Md. 116; *Scharf v. Tasker*, 73 Md. 378; *Drennen v. Banks*, 80 Md. 310; *Whitman v. State*, 80 Md. 410.

In the brief of the learned city solicitor reliance is placed upon the cases of *Hyattsville v. Smith*, 105 Md. 322, and *Cecil v. County Commissioners*, 121 Md. 696. In the first of these cases the question presented by this record was not before the Court, although some general rules upon the subject of valid taxation are stated. In the second case the Court was dealing with a *fee officer*, and held that he was subject to the provisions of section 1, Article 15, of the Constitution.

Order affirmed, with costs.

NELLIE M. MULLER

vs.

CHARLES W. MULLER.

Divorce: separation and abandonment.

Separation and intention to abandon must concur, in order to constitute cause for divorce on the ground of abandonment; but they need not be identical as to the time of their commencement.

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Desertion, to constitute a ground for divorce, requires a simultaneous separation and intent to desert; although both elements must concur, they need not begin at the same time; but the desertion begins when to one element the other is added.

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When a man ended all relations with his wife and left her, contributing nothing to her support, and announced to others that he had gone to another city to join a woman, who he said was the "dearest thing on earth to him," and whom he hoped to marry, and where it does not appear that the wife concurred in the desertion, the facts of the case are such as to entitle the wife to a divorce *a mensa*.

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Decided January 14th, 1915.

An appeal from the Circuit Court of Baltimore City.
(DAWKINS, J.)

The facts are stated in the opinion of the Court.

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The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Clifton S. Brown, for the appellant.

George A. Solter (with whom was *Wm. S. Bansemer*), for the appellee.

BURKE, J., delivered the opinion of the Court.

The appellant filed a bill of complaint in the Circuit Court of Baltimore City against her husband, Charles W. Muller, asking for a divorce *a mensa* and for alimony and counsel fees. The parties were married in October, 1901, and it is alleged that the defendant abandoned the appellant on or about December 26, 1912. The abandonment relied upon took place in Baltimore City where the parties were then living. The appellee went to New York about December 26, 1912, leaving his wife in Baltimore. He has never returned and has never informed her of his intention to return. He has never requested her to join him in New York, and has never informed her where his place of residence is in that city, nor has she ever known.

The husband answered the bill, and denied that he had abandoned his wife and averred "that his residence in New York has been temporary only and for the purpose of obtaining employment." The appellant took testimony to support the allegations of the bill; but the defendant did not testify or offer any evidence. The case was set for hearing, and the lower Court, after argument by counsel for the parties, passed a decree dismissing the bill, and from this decree the wife has appealed.

The testimony in the record does not present the husband to the favorable consideration of the Court. He appears to have been a person of a sullen and disagreeable disposition, and that he frequently used abusive language towards his wife, and his conduct towards her was characterized by the

utmost coldness and indifference. The evidence shows that when he left his wife he had lost all affection for her, and for a long time prior to his going away he had shown her no consideration or attention whatever. For about five years before leaving he had declined to pay any of his wife's bills, and gave her only about fifty dollars a year for her clothing and other necessities. For three or four years prior to his leaving, he and his wife had lived with Mr. and Mrs. A. Warfield Monroe,—his wife's parents,—who appear to be people of very moderate circumstances. During all that time he contributed nothing to his own or his wife's support, although he well knew that it was a great burden upon his wife's parents to support himself and wife. They had appealed to him to assist in defraying the household expenses, which he had failed to do, assigning as a reason that he had no money, although it had been his practice to go to New York during Christmas time to enjoy the festivities there. In November before he left, he received in cash about four thousand dollars from some real estate which he sold. He packed his trunk and took practically all his clothing of any value, and left without saying good-bye to his wife, or telling any one when he would return.

Mrs. Monroe in giving an account of the circumstances under which he left home, said, that he "had on all new clothes from his hat to his shoes, and a new overcoat, and he had his grip and a suit case and his umbrella and cane that had been fixed up for him and he had sent his trunk away. Now I do not know what was in that trunk. He packed it himself that time; before that he always had me to pack it. but this time he packed it himself, and I do not know what was in it. When he left he came out and said good-bye to Mr. Monroe and he kissed me and said good-bye, and I said. 'Charles. I hope you have a pleasant trip,' and he looked at me and walked out and did not say a word to Mrs. Muller—Nellie, his wife, who stood right there in the hall. I saw that. Q. Did he see his wife? A. Yes. He was sitting

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there talking with his friend and the gentleman—the one that was there, he said ‘Come and help me to the cars,’ and he went off and helped him on the car; that was the last. Q. Did he say when he was coming back? A. No.” In her cross-examination Mrs. Munroe said, that “his actions showed that he did not intend to come back,” and that her daughter’s situation had become embarrassing. There is other evidence of the same import and effect.

John T. Elliott testified that the defendant had a conversation with him just prior to leaving for New York, in which he read a portion of a letter from a woman whom the witness named. In this letter she upbraided him “for being so dilatory about getting a divorce from his wife and instances were cited—one instance was cited by her where a party under similar conditions got a divorce without any trouble, and that he was simply dilatory and was not serious, and was not doing what he said he would do.” That in a subsequent conversation with defendant he referred to other communications he had received from the same woman, and he said, “I must produce the papers”—meaning the divorce papers. The witness further testified that the defendant expressed a desire to be divorced from his wife, but that he wished the initiative to be taken by her, and that he intended to leave and stay away in order that she might take the initiative, as he did not propose to contribute towards the support of two establishments—meaning one establishment for Mrs. Muller and the other an establishment for the woman named whom he intended to marry, and whom he characterized as “the dearest thing in this world to him.” The witness saw the defendant in New York in January, 1913, on three occasions in company with the woman mentioned, and took meals with them at hotels or cafes; that he asked defendant whether he was coming back to Baltimore. and he said that he did not know whether he would be back or not. After leaving Baltimore he sent the plaintiff a check for a sum not exceeding fifty dollars, and also sent some

cotton or linen dress goods to Mrs. Monroe. He also sent advertisements and programs of musical productions, on most of which Mrs. Monroe was obliged to pay the postage. He told his wife to address him at a hotel in New York where he did not live. Since July or August, 1913, he has never communicated with her.

It is provided by Article 16, section 38 of the Code, that a divorce *a mensa et thoro* may be granted for "abandonment and desertion." The ground upon which the divorce is asked being declared by the statute, it was necessary for the complainant to allege and prove statutory cause. Abandonment is the deliberate act of the party complained of, done with the intent that the marriage relation should no longer exist. *Lynch v. Lynch*, 33 Md. 328; *Gill v. Gill*, 93 Md. 652; *Twigg v. Twigg*, 107 Md. 676; *Matthews v. Matthews*, 112 Md. 582. "Desertion as a matrimonial offense is the voluntary separation of one of the married parties from the other or the voluntary refusal to renew the suspended cohabitation, without justification, either in the consent, or the wrongful conduct of the other. Its inherent affirmative elements are two—cohabitation ended, and the offending parties' intention to desert." *Bishop on Marriage and Divorce*, Vol. 1, sections 662-63. In all cases there must be an intention to abandon.

"Separation and intention to abandon must concur in order to constitute cause of divorce on ground of abandonment; but they need not be identical in their commencement. *Pinkaid v. Pinkaid*, 14 Tex. R. 357.

"Although to constitute desertion, there must be a simultaneous separation and intent to desert, and desertion does not exist without the presence of both, the two need not begin together, but the desertion begins whenever to either one the other is added." *Bishop on Marriage and Divorce*, Vol. 1, sec. 1696; *Taylor v. Taylor*, 112 Md. 666.

Now, the question to be decided is: Do the facts contained in the record show that the appellee abandoned the appellant within the meaning of the statute as defined by the authori-

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ties referred to? If he did she is entitled to the divorce prayed for. That the appellee separated from his wife in December, 1912, is proved and is not denied. The cohabitation was ended then, and has never been resumed. No explanation or excuse has been offered for his continued absence or failure to support and protect his wife. The intention to abandon must be deduced by the Court from the facts and circumstances of the case.

The conduct and declarations of the appellee, established by the uncontradicted evidence to which we have alluded, are irreconcilable with an intention to return and discharge his marital obligations. It furnishes a reason for his remaining in New York, viz: to enjoy the companionship of her, whom he said "was the dearest thing on earth to him," and whom he hoped to marry.

In our opinion, the evidence fully meets the requirements of the statute. There is no evidence to support the contention that the appellant knew that her husband left her with the intent to abandon her, or that she concurred in the desertion. The decree must, therefore, be reversed, and the cause remanded, the appellee to pay the costs.

*Decree reversed and cause remanded,
appellee to pay costs.*

THE MAYOR AND CITY COUNCIL OF BALTIMORE
AND THE BALTIMORE AND OHIO RAIL-
ROAD COMPANY

vs.

OTTO BREGENZER.

Constitution, Article 3, section 40: taking private property for public use; compensation; kind of "taking" prohibited; mere inconvenience, or mere diminution of light and air not sufficient.

The taking of private property for public use, without first making or tendering the just compensation therefor, as provided in sec. 40 of Art. 3 of the Constitution, may be prevented by injunction. p. 82

The constitutional right to compensation for private property so taken, does not extend to cases where the land is not actually taken, but is only indirectly injured. p. 85

Mere *inconvenience* of access to property resulting from acts done, or the mere *diminution* of its light and air, does not constitute a taking of the property within the meaning of that provision. For such injury to come within this provision, it must be such as to amount to their substantial destruction. p. 87

Acts done in the proper exercise of *governmental powers*, and not directly encroaching upon private property, do not constitute a taking of property within that constitutional inhibition, even though the consequences of those acts may impair the use of the property. p. 85

Under the discretion and authority of a municipal ordinance, a railroad company, in order to form an approach to a bridge over another street, changed the level and the grade of the street and sidewalk in front of certain houses of the complainant. The effect was to cut off the cellar windows of the house and thereby

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to reduce somewhat the amount of light and air, and also, in varying degrees, to change the relative heights of the doors of the houses from the pavement, but not so as to cut off the access to the street; but during the building of the structure the access and egress of the property was much impeded: *Held* that this did not present such a "taking" as to warrant the issuing of an injunction. p. 87

For any damages or impairment of values to the property thus arising, an action at law would lie. p. 87

Decided January 14th, 1915.

Appeal from the Circuit Court No. 2 of Baltimore City.
(AMBLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE and CONSTABLE, JJ.

Robert F. Leach, Jr., Assistant City Solicitor (with whom was *S. S. Field, City Solicitor* on the brief), for the appellant.

J. Cookman Boyd and Emil Budnitz, for the appellee.

BURKE, J., delivered the opinion of the Court.

Otto Bregenzer, the appellee on this record, filed a bill of complaint in the Circuit Court No. 2 of Baltimore City in which he prayed that the Mayor and City Council of Baltimore and the Baltimore and Ohio Railroad Company be restrained from erecting in front, against, and upon his property the approach mentioned in the bill, to a bridge which it was proposed to erect over Eutaw street. Both defendants answered the bill, and testimony was taken in open Court under the Statute. Upon the facts in evidence the lower Court determined that "at least as to Nos. 424, 426, 428 and

430 West Cross street, the construction of the proposed viaduct on Cross street according to the approved plans offered in evidence, even as explained, or modified by the witness. Ogier, would amount to a taking of the plaintiff's property, under the decision of the Court of Appeals of Maryland in the case of *Walters v. B. & O. R. R.*, 120 Md. 644," and ordered that both defendants be enjoined "from constructing said viaduct in front of the plaintiff's property on Cross street mentioned in these proceedings according to the said plans unless and until just compensation, as provided by the laws of this State, shall have been fully paid or tendered to the plaintiff."

The following statement embraces all the material and essential facts in the record: The appellee is the owner of seven leasehold lots of ground with improvements thereon situate on the north side of Cross street between Warner and Eutaw streets in Baltimore City, and known as Nos. 424, 426, 428, 430, 432, 434 and 436 West Cross street. Each lot has a front on Cross street of twelve feet with an even depth of sixty feet to a *three foot alley*, except No. 426 West Cross street, which has a front of fifteen feet with a like depth of sixty feet. The improvements consist of two-story brick houses, in fair condition, with cellars about seven feet high and fourteen feet long. Each house has two sunken cellar windows, 24 inches high and 27 inches wide, except house No. 436. This house has an areaway and one cellar window.

The first floor of each house is elevated above the pavement, and the entrance to each house is by means of steps leading from the street—the number of steps varying from four to six. The houses are rented to colored tenants. For some of the houses the appellee receives seventeen dollars per month each, and for others he receives three and three dollars and a half per week.

Under the provisions of Ordinance No. 387, as amended by Ordinance No. 320, approved July 16, 1913, the Mayor

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and City Council of Baltimore, was about to change the grade of Cross street in front of the plaintiff's property, and the Baltimore and Ohio Railroad Company, under the terms of said ordinance, was about to begin the construction of a bridge over Eutaw street and also the construction of an approach to said bridge—the approach to be located in the bed of Cross street adjacent to the houses mentioned. The purpose of this work was to carry the traffic over Eutaw street and to eliminate the dangerous grade crossing on that street. The Baltimore and Ohio Railroad Company in its answer to the bill filed in this case said: "That unless prevented by the writ of injunction it intends to and in fact is compelled by the provisions of Ordinance No. 387 of the Mayor and City Council of Baltimore, approved August 16, 1909, a copy of which is filed herewith, marked 'Defendant's. the Baltimore and Ohio Railroad Company, Exhibit No. 1,' and within the time set out in said ordinance and in accordance with plans and specifications which have been approved by and are on file with the city engineer of Baltimore City, to change the grade of Cross street between Sharp and Warner streets, by means of the construction of a steel girder bridge over the present railroad tracks in Cross street, with the necessary stairways and approaches thereto, as will more particularly appear by reference to said ordinance and plans."

The approach will be of concrete construction, with a width of 25 feet for a drive way and 10 feet for a footway. and it is proposed to construct it on the building line in front of the plaintiff's property and in contact therewith. It is to be built upon what is practically a five per cent grade, and the effect of the construction upon the plaintiff's houses would be as follows, viz: *First*, it would necessitate the removal of the steps to which we have referred; *secondly*, it would completely obstruct the cellar windows and the area-way mentioned and shut off the light and air from the cellars of the houses; *thirdly*, the relation of the footway, adjacent to the property would be as to the respective houses as fol-

lows, viz: the surface of the footway in front of house No. 424 would be 20 inches above the first floor; in front of house No. 426 it would be 8 inches above the first floor level; in front of house No. 428, it would be one inch above the first floor level; in front of house No. 430, the first floor level would be $5\frac{1}{2}$ inches above the surface of the approach; No. 432 would be 14 inches above; No. 434, 22 inches above, and No. 436, 30 inches above. It would therefore require a less number of steps to enter four of the houses after the construction than is now required. As to house No. 424 it would require two steps down from the proposed footway to reach the first floor, and one step down to reach the first floor at No. 426. The first floor of No. 428 would be practically level with the footway. During the construction of the approach very great inconvenience as to ingress and egress to and from the houses would be suffered by the occupants thereof. The approach would be built wholly within the limits of the street and there would be no actual or physical invasion or appropriation of any part of the plaintiff's lots.

Ordinance No. 387 was considered by this Court in the *Walters case*, *supra*, and in *Baltimore and Ohio Railroad Company v. Kane*, 124 Md. 231, and *Baltimore and Ohio Railroad Company v. Kahl*, 124 Md. 299. In the two latter cases the liability of the railroad company for damages to property of abutting owners resulting from the construction of a similar approach was established.

It is declared by Section 40, Article 3 of the Constitution that, "The General Assembly shall enact no law authorizing private property to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a jury, being first paid or tendered to the party entitled to such compensation." The jurisdiction of a Court of Equity to prevent by injunction the taking of private property for public use in disregard of that section of the organic law is well established in this State. *Western Md. R. R. Co. v.*

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Owings, 15 Md. 199; *American Telephone Co. v. Pearce*, 71 Md. 535.

It is proper to say, in view of certain remarks of counsel at the hearing, that the Court does not understand that it announced a new legal principle in the *Walters case*, or that it impaired in the slightest degree the settled principles of law upon the subject it was dealing with. It merely applied these principles to the facts of that case.

The section of the Constitution quoted does not define property, nor does it declare what shall be a taking. It leaves those questions to the determination of the Courts upon the facts of each particular case. The general rule applicable to the subject was stated in *Garrett v. Lake Roland R. R. Co.*, 79 Md. 277. In that case the abutment of solid masonry in the bed of North street and the elevated structure of which Mr. Garrett complained were located nine feet and eight and one-half inches from the curb line of his property. No part of the street was included within the lines of his deed for the property located on that street and directly opposite the abutment. It was alleged that the construction of this abutment of solid masonry in the bed of North street and the elevated structure would, by reducing the width of the street in front of the plaintiff's lots to less than ten feet, *destroy the access to his property* from North street and prevent him from reaching the same with vehicles ordinarily used in Baltimore. It was further charged that the *destruction* of his right of access to his property would render it entirely unsalable, and deprive him of the market value thereof, and constitute in fact and in law a taking of his property without making compensation therefor, as required by the Constitution of the State. It was further alleged that this structure *deprived the premises of light and air*, and that, too, was alleged to be a taking of the property within the prohibition of the constitution.

In discussing the contention that the facts alleged would constitute a taking of the plaintiff's property for public use

in contravention of the constitution, JUDGE MCSHERBY said: "Whilst the Constitution of the State has prohibited the taking of private property for a public use without compensation being first paid or tendered, it has not undertaken to define or declare what shall be a taking within its terms. True, there is some conflict among adjudged cases as to what amounts to such a taking, but the overwhelming weight of authority accords with the conclusions which this Court announced in two cases that will be fully referred to later on. Apart from the decisions of the Supreme Court of Ohio (*Crawford v. Village of Delaware*, 7 Ohio St. 460), which rest upon a doctrine peculiar to that State, and the recent New York decisions in the *Elevated Railway cases* (*Story v. New York Elevated R. R. Co.*, 90 N. Y. 122; *Lahr v. Metropolitan Elevated R. R. Co.*, 104 N. Y. 268), which are hopelessly in conflict with the principles announced in other cases in the same State (*Radcliff v. Brooklyn*, 4 N. Y. 195; *Fobes v. R. R. Co.*, 121 N. Y. 505), and the decisions in Minnesota (*Adams v. R. R. Co.*, 39 Minn. 286; *Lamm v. R. R. Co.*, 10 L. R. A. 268), and a few cases in Mississippi (*Theobald v. R. R. Co.*, 66 Miss. 279), and possibly one or two other States, all substantially following the New York Elevated Railway cases; there is practically an unbroken current of adjudged cases broadly and clearly marking and defining the difference between an incidental injury to, and an actual taking of, private property. An injury to, and a taking of, such property are distinct things. Every taking involves an injury of some kind, though every injury does not include a taking. 'Property is taken by an entry upon and appropriation of it, as in the ordinary case of location. It is injured by obstructing access, as in *Penn. R. R. Co. v. Duncan*, 111 Pa. St. 352, or drainage, as in *Penn. S. V. R. Co. v. Ziemer*, 124 Pa. St. 560.' *Jones v. R. R. Co.*, Pa. 25 Atl. Rep. 137. In *Transportation Company v. Chicago*, 99 U. S. 635, the Court said: 'Persons appointed or authorized by law to make or improve a highway are not responsible for consequential damages, if

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they act within their jurisdiction, and with care and skill, is a doctrine almost universally accepted alike in England and in this country.' *British Cast-Plate Mfs. v. Meredith*, 4 Term, 794; *Sutton v. Clarke*, 6 Taunt. 29; *Boulton v. Crowther*, 2 Barn. & C. 703; *Green v. Borough of Reading*, 9 Watt. 382; *O'Connor v. Pittsburg*, 18 Pa. St. 187; *Callender v. Marsh*, 1 Pick. 418; *Smith v. Washington*, 20 How. 135. * * * The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the Constitution of every State, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.' And this was affirmed in *Chicago v. Taylor*, 125 U. S. 161. The constitutional right to compensation for private property taken for public use does not extend to instances where the land is not actually taken, but only indirectly or consequentially injured." He then considered at length the case of *Willison v. Cumberland*, 50 Md. 148, and *O'Brien v. R. R. Co.*, 74 Md. 363.

In *DeLauder v. Baltimore County*, 94 Md. 1, it appeared that Mrs. DeLauder's right of way was *wholly destroyed* by the county in the construction of a culvert, embankment and guard rail on a county road. This easement of way was declared to be private property and its *total destruction* was held to be a taking within the meaning of the Constitution. It was said by JUDGE PEARCE, in delivering the opinion in that case, that, "It is well settled in this State that as against a municipal corporation in the careful exercise of its right and power to grade and improve public streets or roads, and where there is no taking or actual physical invasion of property, there can be no cause of action for an unavoidable injury done. It was so decided in *Balto. & Pot. R. R. v. Reaney*, 42 Md. 132, and in *Green v. City and Suburban*

R. W., 78 Md. 304. The latter case was one of much hardship, but of clear law, for whilst by reason of the raising of the grade of the turnpike, Green was put to serious inconvenience and expense in changing the mode of ingress and egress to and from his premises, the means of ingress and egress was not destroyed. There was, therefore, no *taking* of any property right, and the damages suffered were consequential, and *damnum absque injuria*. So in *O'Brien v. Balto. Belt. R. R. Co.*, 74 Md. 375, where a cut was made in the bed of the street in front of the plaintiff's property, but the street, after the cut was made, remained forty-one feet wide. The most that O'Brien claimed was that he was deprived of the use of the street, *as it had before existed*, and that his property was thereby depreciated in value. The injury, therefore, whatever its extent, was held to be of an incidental or consequential nature, not entitling him to recover damages. In that case, JUDGE ALVEY, referring to the constitutional provision forbidding the enactment of any law authorizing private property to be taken for public use, without just compensation, observes that 'this provision does not profess to declare what rights shall be regarded as property, but the thing of which the party is deprived, must be private property, and it must be taken for a public use. Nor does the Constitution declare what shall constitute a taking within the meaning of the inhibition. These are questions of definition left to be fixed by a just construction of the terms employed.' The injury inflicted upon Mrs. DeLauder is not the rendering the use of her right of way inconvenient or expensive, but it is the destruction of its use, and its destruction is a *taking* in as just a sense as the appropriation of a gravel bank for the repair of a public road would be a taking."

In *Walters v. B. & O. R. R. Co.*, *supra*, JUDGE STOCKBRIDGE, after a clear and succinct statement of the facts, said, "that the effect of this structure was to *effectually bar all ingress to and egress from the premises*, unless by means

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of a ladder from the second floor window to the newly constructed footway." This was tantamount to saying that the plaintiff's right of access to the property was in *effect destroyed*. In the judgment of the Court the facts brought the case within the principles announced in the DeLauder case, and that case was followed and its principles applied.

In none of the cases is it held that *mere* inconvenience of access resulting from acts done, or *mere* diminution of light and air constitute a taking of private property. The injury complained of must amount to a *substantial destruction* of these rights before the provisions of the Constitution can be invoked.

The facts of this case show that the construction of the proposed viaduct in its effect upon the property of the plaintiff would be widely different from the effect produced in the *Walters case*. We have stated all the essential facts in the earlier part of this opinion as strongly and as favorably to the plaintiff as they will warrant, and when considered in the light of the principles we have stated we are of opinion that the construction of the proposed approach will not be a violation of the section of the Constitution relied on,—the plaintiff's property will not be *taken*. Access to and egress from the property will not be destroyed. Light and air will not be wholly shut out. The property will undoubtedly be injured; but for all depreciation in its value,—for all losses of every description which the plaintiff may suffer as a direct result of the construction he may recover in an action at law, and being of opinion that the construction will not constitute a taking of the plaintiff's property, but that the apprehended injuries are in legal contemplation merely indirect and consequential, the decree appealed from must be reversed.

Decree reversed and the bill dismissed, the appellee to pay the costs.

MARY E. SCHAFFER

vs.

THE ESTATE OF MARGERY J. RICHARDSON.

Marriage and legitimacy: burden of proof.

When a marriage has been consummated in accordance with the forms of law, it is presumed that there were no legal impediments to such marriage; and the fact, if shown, that either or both of the parties have been previously married, and that the other party to such previous marriage was still living at the time of the second marriage, the presumption is that the former marriage had been legally dissolved; and the burden of proving that the former marriage had not been dissolved rests upon the party seeking to impeach the second marriage. pp. 93-94

Decided January 14th, 1915.

Appeal from the Orphans' Court of Baltimore City.

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, UENER, STOCKBRIDGE and CONSTABLE, JJ.

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Alfred J. O'Ferrall and James M. Muller, for the appellant.

Charles G. Baldwin and G. Ridgley Sappington, for the appellee.

BURKE, J., delivered the opinion of the Court.

Letters of administration were granted by the Orphans' Court of Baltimore City to Thomas C. McGuire on the estate of Margery J. Richardson who died intestate on April 13, 1913. He reduced the assets of the estate to cash, and upon his petition the Court fixed November 27, 1913, as the day for the meeting of distributees with a view of making distribution of the residue of the estate in the hands of the administrator to those entitled to receive the same.

A contest arose over one-quarter of the estate. Upon the evidence embraced in the record, and after full hearing, the Court ordered that the one-quarter of the estate in controversy be distributed among the appellant and the appellees in equal portions. From this order the appellant has prosecuted this appeal.

The only next of kin of Margery J. Richardson were the children and descendants of two brothers and two sisters who predeceased her. One of her brothers was James Washington McGuire, who died in Honolulu, Hawaii, in July, 1912, and the dispute in this case concerns the one-fourth part of the estate, amounting to two thousand seven hundred and seventy-five dollars, to which he would have been entitled, if living.

In 1848 he married Mary Eliza Smith, and lived with her in Baltimore. They had one child, Mary E. Schaffer, the appellant on this record. The record tells us very little about him or his wife during his residence in Baltimore. He was a ship carpenter, and was accustomed to be absent from his home for long periods of time. He left Baltimore in 1849

and went to California, and never returned, except on one occasion, when he looked for his wife and child, but failed to find them. His wife went to Virginia to live prior to the Civil War, and in 1866 procured a divorce from him in that State on the ground of abandonment. She has not been seen or heard from for many years, and is presumed to be dead. The daughter saw her father last about the year 1854 when she was five years old. When seven years old she was taken to the home of Mrs. Richardson, her aunt, with whom she lived for about eight years. During which time her father sent fifty dollars every six months for her support. Very little is known of the father after he left Baltimore until the year 1855, at which time he was residing in Honolulu.

On the 14th of September, 1855, he was baptized and married in Honolulu, Hawaii, by the Reverend Father Herman, a priest of the Roman Catholic Church, to Maria Vanbergin, and lived with her in Honolulu as man and wife until his death in 1912. That this marriage was celebrated according to the rites and ceremonies of the Roman Catholic Church is clearly established by the evidence. We quote from the depositions of Mrs. Maria McGuire, Frank Andrade and Charles B. Wilson:

Mrs. McGuire:—"I was married to James Washington McGuire September 14, 1855, by and in the presence of the Reverend Father Herman in Honolulu, Territory of Hawaii. My father being also present, and he is now dead."

Frank Andrade:—"While I did not see them actually married, from my early boyhood about 1855, these two people, Mr. and Mrs. McGuire, were always known as a married couple, associating with some of the best families in Honolulu, passing each other off to their friends and associates as husband and wife, and at the same time rearing and educating a large family of children."

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Charles B. Wilson:—"I did not see the marriage ceremony performed, but I do know that Mr. and Mrs. McGuire were living together as married people generally do. When I met them in 1867 they had some children, and later on had other children, and I do know that it was generally known and understood that Mr. and Mrs. McGuire were married people, and in all the years that I have known them this fact has never been questioned."

The nine appellees on this record, whose ages range from 58 to 30 years—three of whom reside in California—are children by this marriage.

They claim to be legitimate children of James Washington McGuire, and as such entitled to share in the distribution of the portion of Mrs. Richardson's estate, which he, if living, would have taken. Mary E. Schaffer, the appellant, and the only issue of the first marriage, claims to be the only legitimate child of James Washington McGuire, and that she is entitled to have the whole share paid over to her.

The question arising from these conflicting contentions is the validity of the second marriage which occurred on September 14, 1855.

Omitting the consideration of the evidence offered to support the claim set up by the appellees that James Washington McGuire secured a divorce from his wife in San Francisco prior to the second marriage, and considering the case upon the facts stated, the question is: Are they sufficient in law to show the validity of the second marriage? This precise question has not been decided by this Court, and it cannot be denied that there is some conflict upon it in the decided cases.

It would be an interminable, as well as a hopeless task, to discuss all the cases upon the subject, or to attempt to reconcile or distinguish them. But there is sound reason and abundant authority for holding that, under the circumstances stated, the contention of the appellant ought not to be

sustained. Of course, if the first marriage was subsisting at the time James W. McGuire contracted the second, there can be no question that the last marriage was void; but there appears to be no imperative rule of law which requires us to hold, under the facts disclosed by this record, that the prior marriage was subsisting.

When it is shown that there has been a formal ceremony of marriage, such as that proved with respect to the marriage of September 14, 1855, the law presumes the competency of the parties to enter into the marriage contract, and when it is shown that the marriage was solemnized by a person acting as minister and followed by cohabitation it will be presumed that the person assuming to officiate at the ceremony was authorized to perform it, that a license was properly issued. and that in the absence of additional or countervailing proof it will be presumed that all the proceedings were regular and valid. 19 *Am. & Eng. Ency. of Law*, 1203-4, and cases cited in the notes.

There appears to be a general concurrence of authority in favor of the proposition that when a marriage has been solemnized according to the forms of law every presumption will be indulged in favor of its validity, or, as stated in *Bowman v. Little*, 101 Md. 273, that "the law presumes morality, and not immorality, marriage and not concubinage, legitimacy and not bastardy."

The tendency of the courts is to hold the second marriage valid especially if there is issue which may be bastardized by a contrary holding, and if the marriage has not been questioned for many years its validity will not be overcome by the mere proof of a prior marriage. In such case the presumption in favor of innocence, morality and legitimacy will prevail over the presumption of the continuance of the former marriage, and it will be presumed that the first marriage was not binding at the time of the second.

This doctrine is well supported by adjudged cases in many States. *Pittinger v. Pittinger*, 28 Col. 308; *Hallums v.*

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Hallums, 74 S. C. 407; *Hunter v. Hunter*, 111 Cal. 261; *Potter v. Clapp*, 203 Ill. 592; *Wenning v. Teeple*, 144 Ind. 189; *Scott v. Scott* (Ky.), 77 S. W. 1122; *Maier v. Brock et al.*, 222 Mo. 74; *Hadley v. Rash*, 21 Mont. 170; *Wingo v. Rudder*, 120 S. W. 1073; *Stevens v. Stevens*, 56 N. J. Eq. 488; *U. S. v. Green*, 98 Fed. 63.

Proof of subsequent marriage alone makes out a prima facie case as to its validity. To overcome this prima facie case, proof of a former marriage is required and also evidence from which it may be concluded that it has not been dissolved by death or divorce. *In re Colton*, 129 Ia. 42; *Patterson v. Gaines*, 6 Howard, 550.

It is said in *Wenning v. Teeple*, *supra*, that "It is settled law in this State that when a marriage has been consummated in accordance with the forms of law it is presumed that no legal impediments existed to the parties entering into such marriage, and the fact, if shown, that either or both of the parties have been previously married, and that such wife or husband of the first marriage is still living, does not destroy the prima facie legality of the last marriage. The presumption in such a case is that the former marriage has been legally dissolved, and the burden that it has not rests upon the party seeking to impeach the last marriage." *Boulden v. McIntire*, 119 Ind. 574; *Yates v. Houston*, 3 Texas, 433; *Dixon v. People*, 18 Mich. 84; *Harris v. Harris*, 8 Ill. App. 57; *Greensborough v. Underhill*, 12 Vt. 604; *Rex v. Inhabitants of Twynning*, 2 Barn & Ald. 386; *Squire v. State*, 46 Ind. 459; *Klein v. Laudman*, 29 Mo. 259; 1 *Bishop, Marriage and Divorce*, Sec. 457.

In an elaborate note to the case of *Pittinger v. Pittinger*, to be found in 89 Am. St. Rep. 199, the author states: "If it is shown that a party to a marriage has contracted a previous marriage and that his or her former spouse is still living, this has been held not to destroy the prima facie validity of the second marriage. In such a case it has been presumed that the first marriage has been dissolved by divorce, and that the burden to show that it has not rests on the person seeking

to impeach the last marriage, notwithstanding he is thereby required to prove a negative. Here, the presumption of the continuance of the first marriage is made to yield to the presumption in favor of the validity of the second marriage and of the innocence of the parties to it." And he cites many cases to support this statement.

In *Maier v. Brock*, 222 Mo. 74, the precise question presented by this appeal was decided. The facts in that case were, that Joseph Maier had married the appellant, Barbara, in Germany, in 1865, and that they had lived together as man and wife until 1866, when he left her and came to the United States. Shortly after he reached this country she heard from him once, but no more until the year 1885, when he visited Germany, and she then saw him for the last time. He went to Missouri some time between the years 1872 and 1874, and took with him a second wife, who lived with him until her death. He then married Marie Balduff, with whom he lived until her death. Two daughters were born of this marriage, who were grown young ladies at the time of the trial of the case. He then married a third wife, from whom he was divorced, and on January 17th, 1902, he again married, and lived with his fourth wife until his death. Of this marriage a posthumus child was born. Maier died in 1904, seized of real estate. Barbara Maier, whom he had married in Germany, instituted suit for the assignment of dower, claiming to be the only legitimate wife of the deceased. These facts presented for decision the main legal proposition in the case, viz: That the subsequent marriages in this country raised a presumption that Maier had been divorced from his first wife prior to his subsequent marriages. In a well considered opinion in which many cases were examined, the Court sustained this proposition, and held the subsequent marriages valid. The same contention was made in that case in support of the appeal of Barbara Maier as was urged upon the Court in behalf of Mary E. Schaffer. The language of the concluding portion of the

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opinion may be appropriately applied in this case: "To lend our concurrence to the contention of counsel for appellant would be equivalent to holding Maier was a bigamist and had lived the life of a criminal for thirty years in our midst; that his wives were concubines and his children bastards. Such a thought is abhorrent to all law and repulsive to every sense of right and justice, and no Court would be justified in so holding, except where the evidence in a case should show such facts to be true beyond a reasonable doubt. Christian marriage is the very foundation upon which the family and the home are based, and upon them the State and the Republic rest; and without marriage and its legal maintenance the family circle would be dissolved, the home extinguished, and the State would become useless and the Republic would decline; and in lieu thereof immorality, chaos, and anarchy would reign supreme."

In view of the conclusion we have reached upon the facts stated, it becomes unnecessary to discuss the evidence adduced by the appellees to show that a divorce was in fact obtained in San Francisco before the second marriage.

Order appealed from affirmed, costs to be paid out of the fund in controversy.

WHITLOCK CORDAGE COMPANY.

vs.

HORACE L. HINE, ET AL.

Decrees: enrolment; setting aside; delay, when not laches. Deeds of trust for benefit of creditors: receivership; contracts relating to—.

In general, a decree or decretal order after enrolment, can be revised or annulled only by a bill of review, or original bill, and not by a petition. p. 102

But when the case was not heard upon the merits, or where the circumstances are such as to satisfy the Court that the decree should be set aside, or where the decree was entered by mistake or surprise (or fraud) the question may be raised by petition. p. 102

Certain receivership proceedings for winding up a partnership and paying the creditors lay in Court for nearly twenty years; some assets then becoming very valuable were sold, and an audit was had, and an account stated and finally ratified, to one class of creditors, without notice to all parties in interest, it was *held*, that the question of whether the decree of ratification should be set aside, could be raised by petition. pp. 107-108

In such a case, a delay of seven months after the final decree of ratification, is not such a delay as to bar relief. pp. 109-110

Where a receivership case has lain in Court for nearly 20 years, creditors will not be presumed to have been continuously

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watching to see whether an audit was made, and a delay of six weeks after becoming aware of the audit, is not an unreasonable delay. p. 110

Receivership proceedings were instituted to wind up a co-partnership and pay off the creditors; one of the partners made also a deed of trust of all his individual property for the benefit of his creditors; the trustee in this deed of trust was the same individual as the receiver; the partner subsequently guaranteed the indebtedness of the receiver to one of the receiver's creditors, and later filed in the trust estate case his authority and direction to the trustee, after settling the expenses and debts due by himself in the trust estate, to transfer the balance to the receiver for the purposes of such receivership. *Held*, that the guarantee of one creditor's debt had no priority, but all the surplus individual assets were applicable to the payment of the receiver's unpaid creditors without preference. p. 111

Quære: Whether a non-resident can come into a Court of this State, employ a solicitor to represent him in recovering a claim from an estate under the control of the Court, and then, if some proceeding is instituted in reference to the claim in accordance with the established practice of the Court, take the position that service can not be had on the solicitor of record who represented that claim. p. 109

Decided January 14th, 1915.

Appeal from the Circuit Court No. 2 of Baltimore City.
(AMBLER, J.)

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UERNER, STOCKBRIDGE and CONSTABLE, JJ.

John Hinkley, for the appellant.

R. Bayly Chapman and *Emory L. Stinchcomb* (with whom was *W. H. DeCoursey Wright* on the brief), for the appellee.

Boyd, C. J., delivered the opinion of the Court.

This is an appeal from a decree passed in the case of *Lord v. Sprigg*, rescinding the ratification of Auditor's Account No. 17, in so far as it directed the distribution of \$3,521.45 to the Lawrence Cordage Works (now Whitlock Cordage Co.), and decreeing that the appellant pay to the receivers the said sum awarded to it by said account. The case of *Lord v. Sprigg* was instituted on June 2nd, 1893, for the purpose of winding up the affairs of the firm of Chas. W. Lord & Co. Upon the filing of the bill Winfield J. Taylor was appointed sole receiver of the firm, and, upon his petition, an order was passed directing him to continue the business until the further order of the Court. On the same day Mr. Lord made a deed of trust to said Taylor of his individual property for the benefit of his creditors. Both trusts are being administered in Circuit Court No. 2 of Baltimore City. Taylor, as receiver, conducted the business, under authority from the Court, for about eighteen months, and negotiated an agreement of compromise with the creditors of the firm at forty cents on the dollar. He made substantial losses and on January 14th, 1895, the Court appointed Samuel D. Schmucker co-receiver. Winfield J. Taylor having retired, and JUDGE SCHMUCKER having died, W. Starr Gephart and Herbert M. Brune are the present receivers. Shortly after JUDGE SCHMUCKER was appointed, the assets remaining in the receivers' hands were sold and the money realized was distributed. Exceptions were filed to the audit, and the Court was called upon to determine the priorities of the creditors in the insolvent receivership.

The case was brought to this Court, and is reported as *Diamond Match Co. v. Taylor*, 83 Md. 394. As seen by that case, many of the creditors agreed to accept forty cents on the dollar, payable in notes, the assets to remain in the hands of the receivers as security for the payment. In continuing the business, with the sanction of the creditors, the receiver, Mr. Taylor, incurred debts for goods purchased from cred-

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itors of the firm, and also from persons not such creditors. He paid most of the composition notes and compromised with certain creditors, who had attached the individual property of Charles W. Lord, at a rate in excess of forty per cent. Exceptions were filed to the auditor's accounts, wherein commissions were allowed the receiver and he was credited with the total sums paid by him in settlement of the attachment suits against Charles W. Lord. The account showing the receipts and disbursements of the joint-receivers was ratified and confirmed, but the exceptions to the other accounts were sustained. On October 31st, 1895, another order was passed referring the case back to the auditor with directions to make distribution of the funds in the receivers' hands to the first, second and third classes as set out in 83 Md.—the first having priority over the other two classes, and the second over the third. The appellees are in the third class, as is also the appellant, unless it can establish its claim for a priority as hereinafter shown. The method of distribution was affirmed by this Court. The case was before us again, reported as *Gephart v. Taylor*, 124 Md. 111, but the questions then disposed of are not involved in this appeal.

By different auditor's accounts the creditors of the first class were paid in full and some payments were made to those of the second class. On March 19th, 1895, the Lawrence Cordage Works filed an account in the receiver's case showing a balance due it of \$1,713.57, and attached to that account are the following papers:

"Baltimore, November 28th, 1894.

As receiver of Charles W. Lord & Company I undertake and agree to pay to the Lawrence Cordage Works, or its assigns, \$250 on December 4th, 1894; and \$250 in weekly instalments thereafter, until my indebtedness, as receiver, to the Lawrence Cordage Works, which now amounts to \$2,343.57, shall have been paid in full, with interest thereon from November 1st, 1894. (Signed) Winfield J. Taylor, Receiver of Chas. W. Lord & Co.

For value received, I hereby guarantee the punctual performance and payment to the Lawrence Cordage Works, and its assigns, of the within undertaking and obligation of Winfield J. Taylor, receiver, and each and every instalment thereof. Witness my hand and seal this 28th day of November, 1894. (Signed) Chas W. Lord (Seal)".

Several payments were made by the receiver, thus reducing the claim to the amount stated above. When Charles W. Lord made a deed of trust he held amongst other property 64 40/100 shares of the capital stock of the Peabody Heights Co. That stock became very valuable—there having been cash dividends of \$275.00 and \$125.00, and the stock finally realizing \$350.00 per share, in May, 1912. There was filed on December 21, 1894, in the trust estate of Charles W. Lord, the following paper:

"In the Circuit Court No. 2 of Baltimore City. In the matter of the trust estate of Charles W. Lord. I hereby authorize and direct Winfield J. Taylor, trustee of myself, after he has settled the expenses and paid all debts due by me individually in said Trust Estate, to transfer all the balance of property in his possession as such trustee, or to which he may be entitled to such, to Winfield J. Taylor, receiver of Chas. W. Lord & Co. (in the above Court case of *Lord v. Sprigg*) for the purposes of said receivership; and I hereby assign and transfer to such receiver subject to the proper expenses and debts of my individual estate all my individual property for the purposes and debts of said receivership. Witness my hand and seal. Chas W. Lord (Seal)".

On May 1st, 1912, an audit was filed in that estate by which the Trustees (who are the same persons as the receivers) were charged with certain amounts and were credited with certain commissions, expenditures, etc., and the 64-40/100 shares of the stock of the Peabody Heights Co.,

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subject to an overpayment by the trustees, were distributed to the receivers, in conformity with the assignment to Taylor on December 21, 1894. That audit was ratified May 23, 1912, and the receivers sold the stock of the Peabody Heights Co., with approval of the Court, for \$22,500.00 subject to broker's commissions and the overpayment of \$4,177.33 by the trustees.

On June 18, 1912, the auditor filed an account in *Lord v. Sprigg* (the receiver case) marked Auditor's Account No. 17, by which he charged the receivers with certain amounts, including the proceeds of sale of the Peabody Heights Co.'s stock, and, after crediting them with commissions, costs, etc., distributed \$3,521.45 (including \$1,802.31 interest) to the Lawrence Cordage Co., \$4,216.84 to balance due the creditors in Class No. 2, and \$8,132.82 to the administrators of Charles W. Lord. That account was ratified on June 29, 1912—no exceptions having been filed to it. On February 13, 1913, Horace L. Hine filed a petition in which he prayed: (1) That the order ratifying the Auditor's Account No. 17 be rescinded; (2) that an order be passed requiring the administrators of Charles W. Lord to pay to the receivers the sum of \$8,132.82 distributed to them; (3) that the Lawrence Cordage Works be required to pay to the receivers the sum of \$3,521.45 distributed to it; and (4) that the receivers be required to distribute the said sum of \$11,654.27 among all of the creditors of the third class, as defined by the decree of October 31, 1895. On February 13, 1913, an order was passed in accordance with the prayer of the petition, subject to cause to the contrary being shown on or before the 28th day of February, 1914, and providing for a copy of the petition and order being served on the Lawrence Cordage Works or Arthur George Brown, its attorney, and on the receivers and the administrators of Charles W. Lord on or before the 18th of February, 1913. A copy was served on Mr. Brown. On February 28th, 1914, the appellant, through John Hinkley, solicitor, demurred to the petition. On September 17th, 1913, Messrs. Sayre and Lewis, execu-

tors of Harold R. Lewis, were made parties defendant and on that day the demurrer was overruled with leave to answer. On October 11, 1913, the appellant did file an answer which was sworn to by its treasurer.

The answer denied that the order ratifying the auditor's account was improvidently and improperly passed, and alleged that the account contained an express adjudication by the auditor that the claim of respondent was guaranteed by Charles W. Lord, individually, and the said claim was therefore given a priority, not only over the creditors of the third class, but also over those of the second class; that the order of June 29, 1912, having been enrolled cannot now be rescinded except by a new bill filed for the purpose; that even if the lapse of time after the enrollment would not prevent it being reopened, as the fund is no longer in the control of the Court, but has been paid to the respondent, any proceeding for a refund of said amount should be brought in the form of a new action; and the Court has no jurisdiction upon the petition to set aside the decree for the payment of the money, paid over seven months before the filing of the petition, and under which decree the money has actually been paid away and is out of the control of the Court. The guaranty, assignment, etc., are then referred to and relied on.

It must be confessed that it is not always easy to determine under the authorities when a petition to rescind an order or set aside a decree, which has become enrolled, should be entertained. The general rule undoubtedly is that a decree or decretal order, after enrollment, can be revised or annulled only by a bill of review or original bill and not by a petition, but there are exceptions to the rule, equally well established as the rule itself, which are generally classified as follows: (1) In cases not heard upon the merits. (2) Where the circumstances are such as to satisfy the Court that the decree should be set aside, and (3) where the decree was entered by mistake or surprise. As this question not infrequently arises, it will perhaps be well to recall what has been decided in this State, even at the risk of making

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this opinion longer than desirable. In *Oliver v. Palmer*, 11 G. & J. 136, the defendants were returned summoned, and, not appearing, the complainants obtained a decree declaring that they were entitled to some relief and an order for a commission to take proof in support of the allegations of the bill. The Court held that a bill or petition could be filed to vacate the enrollment of a decree alleged to have been obtained by surprise, and to let in the defendant to answer. The Court referred to the decision in *Benson v. Vernon*, 4 Bro. Par. Cases, 546, in which the defendant was in contempt for not answering and the bill was taken *pro confesso*, and said: "In neither case were the merits of the defendant's case developed. In each, the object and design would be the same, to get rid of the decree, that defendant's defense to the merits might be let in. In point of principle, it seems to us difficult to distinguish the cases. Technically it may be true, that in the one case, the decree would be on the merits, and the other not; but in point of fact, in neither case would the decision be on the merits of the defendant's case, not having filed his answer, or taken his testimony." The Court said: "Had the design been to set aside the decree for fraud, the remedy would clearly have been by bill of review, and not by petition." That case makes some explanation of what is meant by "the merits" and "surprise," as used in this connection by the authorities. In *Marbury v. Stonestreet*, 1 Md. 147, many cases are cited, and the Court said: "From these cases it appears, that there has been no settled practice on these subjects." The Court also spoke of the practice when the fund had been distributed, which we will refer to later.

Thruston v. Devecmon, 30 Md. 210, and *Herbert v. Rowles*, 30 Md. 271, are good illustrations of the two classes of cases. In the former it was held that a petition filed after enrollment which suggested fraud and malpractice, not in reference to obtaining the order of ratification, but in regard to the claims allowed the appellee, was not sufficient. JUDGE ALVEY said: "The only proper modes recognized by law, for reversing or annulling a decree or a decretal order, after en-

rollment, in the absence of surprise or irregularity in obtaining it, are by bill of review for errors apparent on the face of the proceedings, or for some new matter discovered since the order or decree passed, or by original bill for fraud." He referred to the fact that the proceeding in *Oliver v. Palmer* was of an *ex parte* character, and the petition was filed on the ground of surprise, and there was no allegation of fraud. He quoted from that case, where it was said: "Had the design been to set aside the decree for fraud, the remedy would clearly have been by bill of review, *and not by petition.*" In *Herbert v. Rowles* it was held that in cases not heard upon the merits, and in which it is alleged the decree was entered by mistake or surprise, or under such circumstances as should satisfy the Court, in the exercise of a sound discretion, that the enrollment ought to be discharged and the decree set aside, relief can be given on petition. JUDGE ROBINSON said: "The decree in such cases being by default, and not upon the merits, the cause of the default can never be the subject of inquiry until the decree has been pronounced, and generally not until *after the term* has passed. Without the exercise, therefore, of this power in the Court to vacate the enrollment, a party against whom a decree had been entered and enrolled by *mistake or surprise*, and without any *laches* on his part, would be without redress, however meritorious his defense may have been." Then after showing that a bill of review would be of no avail, because the claim for relief is not based on error apparent in the decree or newly discovered evidence, and as there was no fraud in obtaining the decree, he could not file an original bill on that ground, he added: "Accordingly it is laid down by the most eminent elementary writers, and fully sustained by adjudged cases, that where a case has not been heard upon the merits, the Courts will, upon good cause being shown 'exercise a discretionary power of vacating an enrollment and giving the party an opportunity of having his case discussed,' 2 *Daniel Ch. Prac.* 1230; 2 *Madd. Ch.* 466."

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In *First Nat. Bank v. Eccleston*, 48 Md. 145, it was held that the enrollment of a decree passed by default, without a hearing upon the merits, may be vacated, to let in a meritorious defense, upon *petition*, without a bill of review or an original bill for fraud. In *Gechter v. Gechter*, 51 Md. 187, it was said that the power of the Court to vacate under a petition a decree not only alleged to be procured by fraud, but which was also a surprise to the party, cannot be considered an open question, since the decision of *Herbert v. Rowles*, *supra*. In *Patterson v. Preston*, 51 Md. 190, a petition was filed to have an order of ratification of sale passed about eight years before rescinded. An audit had also been ratified distributing the proceeds of sale. JUDGE MILLER said: "We entertain no doubt as to the power of a Court of Equity, upon a proper case being made by the alleged purchasers, to rescind an order ratifying a sale reported by its trustee." An order dismissing the appellant's petition was reversed and the cause remanded to the end that the sale be vacated, etc. In *Downes v. Friel*, 57 Md. 531, relief was refused upon petition, but the petition did not allege fraud, mistake or surprise in entering the decree, and the case was submitted to the Court for a decree, without argument, by a written agreement of solicitors. In *Trayhern v. Mech. Bank*, 57 Md. 590, it was said that the order of November 20th, 1879, had become enrolled and could not be set aside on petition, "*except upon a showing of fraud, surprise or mistake.*" Mrs. Trayhern's account had been excepted to in the audit, and the exceptions were overruled, and the audit ratified November 20th, 1879. Before the term expired, the bank filed a petition asking for a rescission of the order of ratification. During the next term, the Court dismissed that petition—leaving the order of November 20, 1879, undisturbed. Later another creditor filed a petition and the Court remanded the case to the auditor, suspended the order of November 20, 1879, and rescinded the order of February 28, 1880, whereby the petition of the bank was dismissed. Of course, in that case the claim of Mrs. Trayhern could not be reopened

on petition. It had been litigated and established in her favor, and the mere fact that another creditor was objecting did not authorize the question to be reopened upon petition, as was explained in the opinion. In *Straus v. Rost*, 67 Md. 465, a bill was filed for the sale of property left by the grandfather of the appellee. The appellee, an infant, was made a defendant, and answered in the usual way, by his guardian. The decree for the sale was passed in July, 1880, and the trustee from time to time made sales of different parts of the property, and these were duly reported and ratified. Several accounts distributing the proceeds were stated and ratified, the last in September, 1882. No portion of the proceeds of sale was distributed to the appellee, nor was any notice taken of his rights, but the whole of his share was distributed to appellant, who was the purchaser of the property and claimed his share under a mortgage given by the father of the appellee. On February 21, 1887, the appellee by his next friend filed a petition against Straus setting forth the above facts, praying that the several audits be rescinded and that the petitioner be allowed his share of the proceeds with interest. The petition did not attack the decree nor impeach the title of the purchasers, nor did it assail the ratification of the audits on the ground of fraud. It nowhere appeared that the attention of the Court was ever called to the construction of the will or the rights of the appellee thereunder. The Court said: "It is a case, therefore, where the Court, through mere inadvertence or mistake, and without having its attention called to the subject, ratified the accounts assailed by the petition," and the order sustaining the proceeding by petition was affirmed. In *United Lines Tel. Co. v. Stevens*, 67 Md. 156, it was held that when a decree or decretal order has been enrolled, it can only be vacated, where fraud in its obtention is charged, by original bill filed for that purpose. In *Mallery v. Quinn*, 88 Md. 38, it was held that when a decretal order is passed *ex parte*, and without a hearing upon the merits, it may after enrollment be vacated upon petition, when the Court is satisfied

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that the order should be set aside, or was entered by surprise or mistake, and would operate as a fraud upon the rights of others. It was said that the averment in that case of fraud "has relation, not to the *obtention* of the order, but to its *effect* after it had been obtained," and hence did not require an original bill. In *Primrose v. Wright*, 102 Md. 105, it was said that a Court of Equity has the power, upon petition or motion, to correct a clerical error in a decree or order after its enrollment, and the power to correct mistakes in its proceedings at any time is not affected by Equity Rule 51. In *Royal Arcanum v. Nicholson*, 104 Md. 472, it was held that an order of Court confirming the inquisition of a jury, that a certain person was insane, and appointing a committee, when no notice of the proceeding was given to the lunatic, may be vacated upon petition to set the same aside, although the order has become enrolled. In *Foxwell v. Foxwell*, 118 Md. 471, the exceptions to the general rule as to enrolled decrees or orders were again fully recognized.

We have thus collected and considered most of the principal cases in this State on this troublesome question, and our conclusion is that the cases of *Oliver v. Palmer*, *Herbert v. Rowles*, *First Nat. Bank v. Eccleston*, *Gechter v. Gechter*, *Patterson v. Preston*, *Straus v. Rost*, *Mallery v. Quinn*, *Primrose v. Wright*, *Royal Arcanum v. Nicholson* and *Foxwell v. Foxwell*, fully sustain the right of the appellees to proceed by petition, under the circumstances of this case.

The audit in question was made without any notice to those who were the real parties in interest, not only in so far as the payment in full of the appellant's account is concerned, but even as to the fact of an audit having been filed. There was nothing in the claim itself to suggest that the appellant would ask priority for it over the other creditors of his class. There is nothing to indicate that the Court's attention was called to the assignment filed December 21, 1894, and the reference in the auditor's report to the allowance of the appellant's claim would not cause the Court to examine it to see whether it was receiving an unauthorized

priority. It was not determined upon the merits, was unquestionably a surprise to the appellees and the circumstances were such as to satisfy the Court that the decretal order should be set aside, as will be further seen later when we pass on the assignment and the guaranty.

We are likewise of the opinion that the other cases mentioned do not conflict with that conclusion, but are distinguishable for reasons which we have stated in referring to them, unless it be *Marbury v. Stonestreet*, in which one of the four judges was of the opinion that the appellant should have proceeded in the former case, and not by an original bill. It was there said: "When the sale has been finally ratified, the fund distributed by an audit and confirmation, and the term passed, a bill, either original or of review, is required, because these proceedings ascertain and determine the rights of the persons interested in the proceeds of sale. The suit is then considered as closed, and such proceedings must be resorted to as will bring the parties again before the Court." That question was not in anywise involved in that case, for in the first place that was a proceeding by an original bill, and not by petition, and moreover the fund had not been distributed.

But in *Straus v. Rost*, *supra*, the proceeds had been distributed and the audits ratified,—the last one over four years before the petition was filed. In *Mallery v. Quinn*, *supra*, that fact was referred to, and in that case it was determined that under a petition an order authorizing a trustee to release a mortgage must be rescinded, the release of the mortgage should be cancelled, and that Mrs. Quinn should return the money with interest to the trust fund. So it cannot be said that the above statement from *Marbury v. Stonestreet* is now recognized as the law of this State as applicable to all cases, if we are to be guided by the later expressions of this Court, made when the questions were directly involved.

There may unquestionably be cases in which it would be necessary to file an original bill, in order to bring the parties back into Court. It is not necessary to determine whether

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the lower Court could have passed a valid order rescinding the order of ratification of this audit, if the appellant had not appeared, for it did appear by solicitor, demurred to the petition, and subsequently answered the petition, by an answer which was sworn to by its treasurer. There is nothing in the record to show that the relation of attorney and client between the appellant and Mr. Brown had so far ceased as to prevent service on him of an order of this character. That question was not raised. In *Carroll v. Lee*, 3 G. & J. 504, where the party and the property were beyond the limits of the State, at the institution of the suit of which the defendant was notified by an order of publication, the Court said: "There might be something, perhaps, in this concurrence of facts, if the property had not been removed out of the State, and the appellant had not appeared and answered the bill, as well as except to the jurisdiction. This he did, and contested the question of merits before the Chancellor, whether the complainant had a right to recover; and if the decree had been in his favor, would assuredly have forced his adversary into the Court of Appeals or forever barred him from further suit for the same property. To say nothing of the effect of the answer upon the plea, this, we conceive, is a waiver of it, and a submission to the jurisdiction." It might well be questioned whether a non-resident can come into a Court of this State, employ a solicitor to represent him in recovering a claim from an estate under the control of the Court, and then, if some proceeding is instituted in reference to the claim in accordance with the established practice of the Court, take the position that service cannot be had on the solicitor of record who represented that claim. Such a position would often be embarrassing to solicitors, especially those of the high standing of the former and present attorneys of the appellant. But for reasons we have stated, it is not necessary to further discuss the question.

Nor do we think the appellees can be charged with laches under the circumstances. The case has been pending for many years, and the creditors could not have been expected

to be constantly watching to see whether an audit had been made. Those of the third class certainly had no reason to suppose that they were to be entirely deprived of any distribution, by having one creditor obtain priority for its whole account. It is conceded that no notice to the creditors of the third class was given of the audit having been filed, which as shown by the auditor's testimony would have been done if he had known they were interested. Nor do we think that the delay in filing the petition for about six weeks after the appellee Hine became aware of the audit was unreasonable. It would necessarily take some time to arrange with counsel, and the solicitors employed would require considerable time to go through the papers in a case of this character, and give them proper consideration. In *First Nat. Bank v. Eccleston*, *supra*, JUDGE MILLER referred to the fact that in *Herbert v. Rowles*, the decree was passed in July, 1865, and a petition to vacate its enrollment was not filed until April, 1866, although the pendency of the proceedings was known to the petitioner's counsel, and added, "yet it is plain from the opinion in that case, that this lapse of time would not have been considered a bar to the relief," if sufficient ground for it had been shown. He said: "We there adopted what was said by LORD HARDWICKE in *Kemp v. Squire*, 1 Ves. Sen. 205, that the power of the Court to open the enrollment is a discretionary power to be exercised or not according to the circumstances of the case, as being applicable, as well to the time when the petition is to be filed, as in other respects."

Coming now to the two papers relied on by the respective parties, it is clear that the guaranty did not authorize the distribution to the appellant out of the proceeds of Mr. Lord's individual property, to the prejudice of other creditors of the receivership, unless there be something in what we will speak of as the assignment of December 21, 1894. That assignment is not dated, but was filed in the trust estate of Charles W. Lord on that day. The guaranty was made nearly eighteen months after the deed of trust was executed,

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and hence was in no sense one of the debts then due by Lord and provided for in that deed of trust. It was not an assignment of any property or funds of Lord. The individual property he owned at the time he made the deed of trust (of which this was a part) was liable for his individual debts and then for his partnership debts, but it was not originally liable for debts incurred by the receiver. The guaranty did not authorize the proceeds of the Peabody Heights stock to be applied to it, more than it was to be applied to any other debt, and those proceeds could not be impounded for the benefit of the guaranty. If the assignment filed December 21, 1894, had not been executed, it is certain that the amount due under the guaranty could not have been audited out of the proceeds of this stock. It therefore remains to see whether that assignment gave the appellant any priority out of the fund.

It is headed, "In the Circuit Court No. 2 of Baltimore City. In the matter of the trust estate of Charles W. Lord." It authorizes and directs "Winfield J. Taylor, trustee of myself, after he has settled the expenses and paid all debts due by me individually, *in said trust estate,*" to transfer, etc. It is clear that Taylor as his trustee, could not, under that provision, pay in said trust estate any debts due by Lord except those he owed when he made the deed of trust. The debt due to the appellant by virtue of the guaranty was not a debt due by him in said trust estate. It then provides "And I hereby assign and transfer to said receiver, *subject to the proper expenses and debts of my individual estate,* all of my individual property for the purposes and debts of said receivership." The "debts of my individual estate" can refer to no other than those in the trust estate, any more than could "the proper expenses." It seems to us to be beyond question that Mr. Lord simply intended by that paper to authorize his trustee to turn over to the receiver what was left after the expenses and debts in the estate of which Taylor was trustee were paid, and subject to those expenses and debts he assigned and transferred all of his individual estate

“for the purposes and debts of said receivership,”—and no suggestion of any priority to the appellant, or anyone else, is made.

We do not understand how the compromise with Lord’s administrators can affect this question. The theory of the appellees, as we understand it, is that the appellant was improperly paid a certain amount, and Lord’s administrators were improperly paid another amount, both of which belonged to the receivership. They have taken these proceedings to have the amounts recovered, for the purpose of distribution among the creditors entitled to them. They have done nothing to release the appellant, and if they are willing to accept less than they claim to be entitled to from Lord’s estate, that cannot injure the appellant, so far as we can find from the record. Of course, if in the distribution of the funds to be returned to the estate, it be shown that the appellant is injured by any improper action of the appellees and others uniting in the compromise, it can then receive such protection as it is entitled to.

Difficulty in recovering the amount from the appellant is suggested in the brief, but that is not now before us. If it does not voluntarily comply with the decree, after it has been determined by this Court that it was not entitled to the amount distributed to it, the necessary steps to recover it can be taken. Under the circumstances we are of the opinion that the decree appealed from must be affirmed.

Decree affirmed, the appellant to pay the costs.

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Syllabus.

WALTER E. HILL

vs.

JOHN H. BOLAND.

Married women: dower; may not be sold or conveyed; relinquishment; title of husband.

But under sections 12 and 20 of Art. 45 of the Code of 1912, a married woman by contract with her husband may relinquish her right of dower, so that real estate then owned by him, or which he thereafter acquires, will be held by him free and discharged from any claim upon her part to dower therein; and a deed by him for such real estate is valid and sufficient to convey title, without the joinder of the wife. p. 118

The dower right of a wife in the estate of her husband is not such a right as may be bargained or sold. p. 115

Decided January 14th, 1915.

Appeal from the Circuit Court of Baltimore City. (DAWKINS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Harry E. Karr and *D. List Warner* for the appellant.

Wm. Purnell Hall (with whom were *Albert Ecke* and *George Keck* on the brief), for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

Can a married woman by contract or deed relinquish her right of dower, so that real estate belonging to her husband can be conveyed by him without her joinder in the deed? That is the sole question which is presented by the record in this case.

The question is raised by a bill for the specific enforcement of a contract of sale of a ground rent of \$42 claimed by Mr. Boland to be held by him free from any right whatever of his wife, Margaret A. Boland, to dower therein.

Mr. and Mrs. Boland had not for sometime been living together on the best of terms; and on the 1st February, 1912, they entered into an agreement executed with all the formality necessary for a conveyance of real estate, which was duly recorded. By the terms of this they agreed to live separate and apart; and in consideration of the sum of \$4,200 cash paid by Mr. Boland to his wife, she "expressly releases, waives, surrenders and assigns to the party of the first part (Mr. Boland) his heirs, personal representatives, legatees, devisees and assigns all her right, claim or title to participate in any way in the enjoyment of the real or personal estate of which the party of the first part may be possessed at his decease, or to obtain or receive any dower or widow's rights therein. And the party of the second part hereby covenants and agrees that at any time after the execution of these

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presents she will at the request and expense of the party of the first part execute, acknowledge and deliver to the party of the first part or his grantee or grantees any proper deed or conveyance, so as to bar the dower or other marital rights of the party of the second part in any property now or heretofore owned, or which may hereafter be acquired by the party of the first part, wherever said property may be situated. And the party of the second part hereby expressly agrees and covenants that she will at any time in the future at the request and expense of the party of the first part execute and deliver such deeds and assurances as may be necessary to carry out the purposes of this agreement."

On the day following the execution of this agreement Mr. and Mrs. Boland executed a deed to Edward L. Kaufman, his heirs and assigns, of "all the right, title, interest, claim or estate of the said Margaret A. Boland, whether the same be legal or equitable, vested or contingent, present or future, and especially and particularly the prospective dower right or interest of the said Margaret A. Boland, into and out of all the real estate or fee simple property now belonging to the said John H. Boland, her husband, * * * and also any prospective right of dower of the said Margaret A. Boland into or out of any property in fee simple which said John H. Boland may hereafter acquire by purchase or inheritance or in any other manner whatsoever."

With regard to the deed purporting to convey the dower right of Mrs. Boland to Kaufman there can be no question but that it was absolutely inoperative. Mr. Kaufman was not created by the deed a trustee for the benefit of Mrs. Boland. The attempted conveyance was one absolute in form to him, his heirs and assigns, and it is the settled law of this State that the dower right of a wife in the real estate of her husband, is not such a right as may be bargained and sold. *Reiff v. Horst*, 55 Md. 42, re-affirmed in *Duttern v. Babylon*, 53 Md. 536. In legal contemplation Mr. Kaufman was a stranger to the parties grantor in the deed. No trust was

created by its terms or to be implied from any language in either the granting or habendum clauses of the deed, and, therefore, under the authorities cited he would take no title to the potential right of dower of Mrs. Boland, which the deed purported to convey to him.

At the common law the wife could make no grant to her husband of property belonging to her or in which she had an interest, so as to bar her right of dower. She was without the power even to contract, and yet even in this condition agreements between husband and wife which were in their nature fair and just, the object of which was to make provision for her, were sustained; *Lively v. Paschal*, 35 Ga. 218; and were held to bar her right of dower where the agreement so provided in terms. This result was reached by the application of the doctrine of estoppel, rather than by a distinct recognition of the existence of a contractual power on the part of the wife. It was sustained even when proceedings between the parties for a divorce were pending, *Woods v. Woods*, 77 Me. 434; and where articles of separation had been entered into between the parties, *Dillinger's Appeal*, 35 Pa. 357; in which case it was said: "True she was not *sui juris* when the contract was made, but many agreements between husband and wife for living separate have been enforced in equity even where there was no trustee to protect the wife,—but here where there was a trustee, and where the contract was fair and reasonable and the wife has had the full benefit of it * * * no Court would hesitate for a moment to enforce the agreement against her. If the contract would have been enforced against the husband for the wife's benefit, it must be against the wife for the protection of the husband's estate. Mutuality is the essence of equity." The doctrine thus announced is impliedly that of this Court in *Emerson v. Emerson*, 120 Md. 584.

The objection is urged that agreements of separation are contrary to the policy of the law of this State, and that they will not be given the sanction of the Court, and for that

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reason this entire agreement of February 1st, 1912, is void and inoperative, to accomplish the end for which it was entered into. The agreement naturally divides itself into two parts, one for the living separate of the parties to it; the other, a contract by which for a present, valuable consideration, paid to the wife, she relinquishes a potential right of dower in the real estate of the husband. The latter, if she was competent to enter into such a contract, might perfectly well have been made, and the parties have continued to live together as husband and wife. It has already been stated that at common law a wife had not the capacity to so contract. Has she that capacity by virtue of the Acts of the Legislature of this State, particularly the Act of 1898 (Ch. 457), known as the Married Woman's Act, now codified in Art. 45 of the Code of 1912? The 12th and 20th sections of that Article read as follows:

"12. Any married woman may, at whatever age she may be, relinquish her dower in any real estate by the joint deed of herself and husband or by her separate deed, or she may authorize an agent or attorney to relinquish the same by a power of attorney executed jointly with her husband or by herself without the joinder of her husband * * * ."

"20. A married woman may contract with her husband and may form a co-partnership with her husband or with any other person or persons in the same manner as if she were a *feme sole*, and upon all such contracts, partnership or otherwise, a married woman may sue and be sued as fully as if she were a *feme sole*."

In the opinion filed by the late CHIEF JUDGE MCSHERRY, in *Duttera v. Babylon*, 83 Md. 536, the power of a wife to relinquish her right of dower is expressly recognized, yet since she did not possess that power at common law, she can only have acquired it by virtue of statutory enactment. The power to relinquish is expressly conferred by section 12

already quoted, which prescribes the requisites for such a deed, requisites which are found to have been complied with in the agreement of February 1st, 1912. But even if that instrument is to be taken as a contract merely, by section 20 she is given the express power to contract *with her husband* in the same manner as if she were a *feme sole*. Regard being had to the purpose and language of the Act, the conclusion is irresistible that Mrs. Boland was competent to relinquish her potential right of dower in the real estate of her husband, and that having executed the agreement of February 1st, 1912, in the form required by the provisions of section 12, by the joint deed of herself and husband, the real estate then belonging to him, or which he might thereafter acquire, was held by him free and discharged from any claim upon her part to dower therein, and that, therefore, his deed to such real estate or any portion of it is sufficient without the joinder of his wife.

The decree of the Circuit Court of Baltimore City of April 30th, 1914, will accordingly be affirmed.

Decree affirmed, with costs to the appellee.

Md.]

Syllabus.

LAURA V. THORNE, ET AL.,

vs.

ANNIE B. THORNE, ET AL.

Wills: construction; trusts; termination. Unexpected conditions: unprovided for in will; on unanimous petition of the parties entitled, equity may terminate trust.

Female minor: release to trustee; Code, sections 7 and 8 of Article 79.

A will devised all the residue of the estate to trustees, in trust, to be held by them to collect the income and apply the same to the payment of all expenses and indebtedness due thereon, with power to sell and reinvest, etc., the property to be so held in trust until it should be worth \$20,000; then to be sold and divided and distributed in ten equal shares; the expenses were greater than the income, and part of the property was sold to reduce the indebtedness, and the remainder was worth less than \$17,000. *Held*, that in view of such conditions, not provided for by the testator, and in the absence of any indication in the will that the property, after payment of the debts, should be held for a possible enhancement in value, that might increase it to \$20,000, a court of equity should comply with the unanimous request of the parties entitled, that distribution be made without delay.

p. 126

Under sections 7 and 8 of Article 79 of the Code, authorizing any female over eighteen years of age to execute a release to any trustees for the proceeds of a sale, and section 10, providing that such release should be a valid discharge, the fact that one female petitioner, out of many, was less than eighteen years old when the petition was filed for the distribution of the trust estate, does not require that there should be a continuation of the trust estate until she should arrive at the full age of 21 years, when she would reach the age of 18 years shortly after the entry of the decree.

p. 127

Decided January 14th, 1915.

Appeal from the Circuit Court of Baltimore City. (DAWKINS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE. JJ.

Robert Biggs and *Harry N. Abercrombie*, for the appellant.

Geo. E. Robinson (with whom was *O. Parker Baker* on the brief), for the appellee.

URNER, J., delivered the opinion of the Court.

By the will of John Thorne, of Baltimore, who died in June, 1905, the residuary estate of the testator was disposed of as follows:

"I give, devise and bequeath unto my hereinafter named executors all the rest and residue of my estate, both real, personal and mixed, to be held by them in trust and confidence, to collect the income and to apply the same to the payment of all expenses and indebtedness due on said property, with power in my said executors to sell and reinvest the proceeds when an advantageous offer is made for any of my said property so held in trust by them. It is my will and desire that said executors shall hold said property in trust until all of the indebtedness is paid in full, including all mortgages heretofore given by me; and it is also my will that my nephews, Frank Thorne and John Thorne, shall execute a deed of the property I gave them to my hereinafter named executors, and that the indebtedness due on their property shall be paid by my estate, but should they refuse to deed the property to my executors, then they are to assume the mortgages

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Opinion of the Court.

now on the same and no portion of which is to be paid by my estate. After all of the indebtedness is paid or at a time when the net proceeds of the property held in trust by my executors may be sold for twenty thousand (\$20,000) dollars or more, it is my will and desire that the same be sold and divided into ten (10) equal shares."

The will then bequeathed the ten shares to legatees who were designated by name.

According to the first administration account of the executors, filed on June 18th, 1907, the residuary estate which they were to hold in trust for the purposes stated in the will consisted of five leasehold properties having an appraised value of \$14,800.00. A second account, filed in the following February, showed that one of the properties had been sold at an advance of \$500.00 over the appraisement, the *corpus* of the estate being thus increased to \$15,300.00. The rents collected to that period amounted to \$2,663.11, but the disbursements, which included the payment of \$1,000.00, on account of one of the mortgages and heavy expenditures for repairs and improvements, aggregated \$6,560.68. This exceeded the income received to the extent of \$3,897.57. The deficiency thus produced was charged to the *corpus*, with the result that the proceeds of the leasehold property which had been sold amounting to \$3,750.00, were absorbed and an over-payment of \$147.57 was reported. The *corpus* of the estate then remaining consisted of four leasehold lots and buildings appraised at \$11,550.00.

The third administration account was filed five years later, in January, 1913. It charged the appellee as executor, his associate having resigned, with the appraised value of the unsold properties belonging to the trust and with \$15,738.89 as collections of rent since the last preceding account. The disbursements credited exactly equaled the amount of the income and represented the payment of a \$2,000.00 mortgage and annual expenses, repairs and improvements as fol-

lows: for 1908, \$1,960.71; for 1909, \$2,397.80; for 1910, \$2,602.45; for 1911, \$3,023.90; and for 1912, \$3,754.03.

In November, 1913, a fourth account was filed. From this it appears that one of the properties had in the meantime been sold for \$15,000.00, which was \$11,250.00 in excess of its appraisement. This would have increased the *corpus* to \$22,800.00, but a mortgage of \$5,098.35, including interest, was paid out of the proceeds of the sale, and the disbursement of \$3,660.24 for repairs and other expenses having exceeded the rent and other receipts of \$2,708.70 by the sum of \$951.54, this deficiency also was charged against the principal funds, and the estate was then reported to consist of three leasehold properties, appraised at \$7,800.00, and \$9,030.11 cash in bank, making a total of \$16,830.11. The payment of the mortgage last referred to completed the settlement of all the indebtedness due and collectible from the estate.

On September 25, 1913, a number of the legatees of the residuary estate filed a petition in the Court below invoking its equitable jurisdiction over the trust and praying for a construction of the will upon the theory that the time had arrived, under its provisions, for a termination of the trust and distribution of the estate among the persons entitled. All of the living legatees, representing eight of the ten shares into which the proceeds of the trust property were to be divided, have joined in the pending application. The other shares were bequeathed to two nephews of the testator who had died intestate since the probate of his will. One of these legatees left a widow and children, who have all united in the petition, and the other died without issue, but leaving a widow who is the administratrix of his estate and who also was made a co-petitioner under an order of the Court. The appellee, as executor, is defendant in the proceedings, and by his answer he opposes the request for the assumption of jurisdiction over the trust by a Court of equity, and denies that the estate is now distributable under the will, asserting

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on the contrary that by its terms the distribution is not to occur until the estate is worth \$20,000.00, to which value it has not yet increased.

The essential facts of the case, consisting mainly of those we have already recited, were established by an agreement of the parties which appears in the record. There was also testimony proving the death and intestacy of the two deceased legatees and the relationship and identity of their next of kin, all of whom are above the age of twenty-one years, except a daughter of one of the decedents who was nearly eighteen years old when the case was presented below for determination. By its decree the Court assumed jurisdiction of the trust and appointed the appellee to hold and administer the estate in the capacity of trustee, but announced its conclusion that the beneficiaries under the will were not entitled to have the trust terminated at that time for the reason that the testator intended that the distribution should be deferred until the estate could be sold for \$20,000.00, and there was no proof to show that this amount could now be realized, or that it may not have the requisite value within a reasonable period, and for the further reason that one of the petitioners was then an infant and, therefore, incapable of voluntarily consenting to such a decree as the petition proposed. The trustee was accordingly directed to hold the estate for further administration under the terms of the will, and the distribution sought by the petitioners was denied. The appeal requires us to review the decree in so far as it refused to direct an immediate division of the estate.

It is argued on behalf of the appellants that as the will directed the executors to hold the residuary estate until the indebtedness should be paid in full, and as that result has now been accomplished, the time contemplated for the termination of the trust has arrived. Apart from this theory, based upon a construction of the will, it is contended that the special circumstances of the case are such as to justify a present distribution.

The trust imposed by the will was that the residuary estate should be held and the *income* applied to the payment of all expenses and debts due on the property, and it was provided that this trust should continue until all of the indebtedness should be paid in full. It was the evident design of the testator that the estate should be kept intact and only the income used for the payment of the debts. While the executors were given authority to sell any of the property, if they should receive an advantageous offer, such a sale was expressly stated to be for the purpose of re-investment. The testamentary plan appears to have been to relieve the estate of indebtedness so that its clear value should enter into the shares provided for the residuary legatees. If this condition had been produced by the application of the *income*, as directed by the will, the object of the trust would have been realized. One of the alternative events would then have occurred which the testator designated as the occasion for the sale of the property and the division of the proceeds. It was plainly not the intent of the will that after the indebtedness had been completely satisfied out of the income, the estate should nevertheless continue to be held in trust until such time as it might be sold for \$20,000.00. There is no provision for the application of the income after the debts to which it was to be devoted were fully paid, nor is there any direction that it shall be accumulated until the estate equals the amount just mentioned. The language used leaves no doubt that it was from a *sale of the property* that the sum stated was to be derived, if at all, and that it was from an enhancement of property value that a possible increase of the estate to \$20,000.00 was anticipated. The idea of the testator, as we understand his will, was that the income from the trust estate, which seems to have amounted to not less than \$2,500 per annum at the inception of the trust, should be applied to the payment of the indebtedness of \$8,000 on the property, with the reasonable expectation that this purpose would be fully accomplished within a few years, but if, while the debts were being thus gradually extinguished by the applica-

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tion of the income, an opportunity should be presented for the sale of the property at a price which would produce for the estate "net" proceeds of \$20,000, clear of the indebtedness, the sale should then be made and the provisions as to the distribution carried into effect.

The trust has now been in existence for more than seven years, but neither of the alternative events upon which its termination is made to depend has yet transpired. While the indebtedness has been fully paid, it has not been satisfied out of the income. In fact the funds derived from that source were insufficient to meet the expenses of the trust properties. If there had been no property sales, it is apparent that the debts would have remained unpaid. Their payment out of the proceeds of the sales was doubtless proper under the circumstances and may have been a necessary incident of the transfer of title, but the adoption of this method and means of discharging the indebtedness did not gratify the primary condition prescribed by the will for the termination of the trust. In reference to the second alternative it need only be observed that while the sales disclosed a substantial increase in the value of the properties, yet there is nothing in the record to show that the estate is now worth \$20,000.00, or that it could at any time have been sold for that amount clear of the indebtedness.

It is manifest, therefore, that a situation has developed which the testator did not anticipate. Instead of the income being available and actually used for the payment of the debts, it has been absorbed, together with a part of the corpus, by the expenses of the estate, including the cost of substantial repairs and improvements. If only a small proportion of the annual income had been applied to the purpose which the testator had in mind, there would have been a sufficient reduction of the indebtedness to have admitted of the payment of the balance out of the proceeds of the property sold in 1913, and to have yet left a corpus of at least \$20,000 for distribution according to the terms of the will. It was certainly never within the testator's contemplation

that the whole of the considerable income of the estate, and large appropriations from the corpus, would be required for the fixed charges and maintenance of the trust properties, and that an enhancement of nearly \$12,000 in their value, as shown by the sales, would produce after an administration of seven years and the payment of an indebtedness of only \$8,000, a net increase of only \$2,000 over the original valuation.

The unexpected conditions which have thus developed are responsible for the inquiry now presented as to the future of the trust. There is no longer any occasion to utilize it for the payment of debts, as they have all been satisfied, and there is no authority in the will for the application of the income to other objects or for its accumulation. Moreover, as the expenses of the trust property have continued to exceed the income, there would be no certainty of an augmentation of the corpus from that source. The important question to be answered, in view of these unforeseen and unusual conditions, is whether the trust should be maintained for an indefinite period in order that a possible enhancement of value may increase the estate to \$20,000, or whether, in the absence of any indication in the will that the testator desired the estate to be held for that purpose after the debts were paid, the unanimous request of the parties entitled that the distribution be made without further delay should be gratified. In our opinion the latter course, under all the circumstances of the case, is the just and proper one to be pursued. Such action is not inconsistent with the testator's intention, as we interpret the will, and it avoids the hardship of depriving the legatees of the present enjoyment of their estate for the mere purpose, against which they all protest, of affording still further time for a possible increase in its value. A Court of Equity has undoubted authority to declare a trust terminated under these exceptional conditions. 39 Cyc. 99; 2 *Perry on Trusts* (6th Ed.), sec. 920; *Donaldson v. Allen*, 182 Mo. 626; *Tilton v. Davidson*, 98 Maine, 55; *Sears v. Choate*, 146 Mass. 395; *Welch v. Episcopal Theo-*

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logical School, 189 Mass. 108; *Culbertson's Appeal*, 76 Pa. St. 145.

While one of the female petitioners, as previously stated, was less than eighteen years old when the case was before the Court below, she attained that age shortly after the passage of the decree. By sections 7 and 8 of Article 79 of the Code any female over the age of eighteen years is authorized to execute a release to any trustee for the proceeds of the sale of real or leasehold property, and by section 10 it is provided that: "The release or receipt of a woman over the age of eighteen years * * * for any money paid, property delivered or obligation satisfied shall be a good and valid discharge * * * in the same manner and to the same extent as releases or receipts of the same character are now by law good and valid when executed and delivered by persons of the full age of twenty-one years." The female petitioner referred to is one of the five children of a deceased legatee, who was bequeathed one-tenth of the residuary estate, and she is entitled, after allowance for her mother's interest as widow, to less than one-fiftieth of the funds to be distributed. As she is perfectly competent under the law of this State to execute and deliver to the trustee, in this jurisdiction, a valid release for her small proportion of the estate, and as all the other beneficiaries have joined in the petition, we see no occasion, in view of the other considerations we have discussed, to order a continuance of the trust until she arrives at the full legal age of twenty-one years.

The decree will be affirmed as to the assumption of jurisdiction over the trust and the appointment and qualification of the trustee, but in other respects it will be reversed and the cause remanded for further proceedings in conformity with this opinion.

*Decree affirmed in part and reversed in part,
and cause remanded, the costs to be paid
out of the trust estate.*

THOMAS HUGHES, TRUSTEE,

vs.

R. G. HARPER PENNINGTON ET AL.

Wills: construction; life estate; reversions.

The will of C. H., after making other disposition of the property, provided as follows:

(a) In regard to the one undivided third part of the residuum " * * * I give and bequeath the net annual income thereof to my granddaughter, E. L. P., for her sole and separate use, for the term of her natural life," etc.

(b) "And after the decease of my said granddaughter, if she should leave a child or children then living, or the descendants then living of any child or children who may have died before her, then the income of said one-third part, as it shall become due, to be applied to the support, maintenance and education of such child, children or descendant *per stirpes* for the term of 21 years after the death of the said granddaughter, or until the youngest child of the granddaughter living at the time of the testator's death should reach maturity, and the principal of said third to be then distributed amongst them *per stirpes*."

(c) But if the said granddaughter did not so leave descendants living at the time of the testator's death, or should all of her said descendants so living die within 21 years of her death, then the principal of such one-third part to go to the testator's sister, E. L. H., if then living; if not, then to go to such persons as she may by will appoint, or to her residuary legatees if she had failed to appoint.

Md.]

Syllabus.

The life tenant died, leaving two sons and no descendants of any deceased child; both of her sons attained the age of 21 years (before the end of 21 years after the life tenant's death): *Held*, that the two sons of the life tenant were entitled to the distribution of the said third of the estate, and that the (c) clause did not apply. p. 134

Decided January 14th, 1915.

Appeal from the Circuit Court of Baltimore City.
(STUMP, J.)

The facts are stated in the opinion of the Court.

The case was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

The case was submitted on brief by *Thomas Hughes* for the appellant.

Frank E. Welsh, Jr., for the appellee.

BOYD, C. J., delivered the opinion of the Court.

This is an appeal from a decree construing Item 12 of the last will and testament of Catharine Harper, deceased. That item is as follows:

(a) "In regard to the one undivided third part of the residuum of my estate, alluded to in the 10th item of my will, I give and bequeath the net annual income thereof to my granddaughter, Emily L. Pennington, for her sole and separate use, for the term of her natural life, to be paid over to and received by her as it shall become due, and without any anticipation of income.

(b) "And after the decease of my said granddaughter, if she should leave a child or children then living, or the descendants then living of a child or children who may have died before her, it is my will

that the income of the said third part, as it shall become due, shall be applied to the support, maintenance and education of such child, children or descendants, *per stirpes*, for the term of twenty-one years after the death of my said grand-daughter, or until the youngest child of my said granddaughter living at her death (or if she leave no child living at her death, then until the youngest of her grandchildren living at the time of her death) attains the age of eighteen years, if a female, or twenty-one years, if a male, whichever shall first happen; and that the principal of said third be then distributed amongst them *per stirpes*."

(c) "But should my said granddaughter not leave descendants living at her death as aforesaid, or should all of such descendants, if any she leave living at her death, die within twenty-one years after her death, then and in such case the principal of said third part shall go to and vest in my daughter, Emily L. Harper, if then living, and if my said daughter be not then living, the said third shall go to and vest in such persons as she may by any testamentary paper appoint, and if she does not specifically make such appointment, then her residuary legatees shall be taken and considered as such appointee."

For convenience of reference we have marked the above clauses (a), (b) and (c), although they are not so marked in the will.

The petition asking for the construction of the will was filed by Thomas Hughes, Trustee, R. G. Harper Pennington and his children, and Clapham Pennington and his children. The trustees under the will of Catharine Harper having died, Thomas Hughes was appointed as their successor. Mrs. Pennington died on the 7th day of January, 1908, leaving surviving her two sons, R. G. Harper Pennington and Clapham Pennington, both of whom have long since passed the age of twenty-one years, but leaving no other chil-

Md.]

Opinion of the Court.

dren or descendants of any deceased child or children. R. G. Harper Pennington executed a deed of trust to Thomas Hughes, Trustee, for the benefit of his children, of one-half of his interest in the estate, until the marriage of said children, and all of them are still unmarried.

The petition states that Thomas Hughes, Trustee, entered into a contract for the sale of what is spoken of as the Stellburg property, and counsel for the purchaser had declined to accept said property, on the ground that the remainder created by the 12th item of the will of Mrs. Harper, to take effect after the death of Mrs. Pennington, is under the terms of the will liable to be divested in the event of the death of all the descendants of Mrs. Pennington within twenty-one years after her death, and that the power conferred by the will of Mrs. Harper upon her daughter, Emily Harper, to appoint by her will the persons to take said remainder was not validly executed, or, if validly executed, would not be effective for reasons therein set out, but which are not necessary for us to state by reason of our construction of the will of Mrs. Harper. Mr. Alex. H. Robertson, Auditor and Master, to whom the case was referred, reported that in his opinion R. G. Harper Pennington and Clapham Pennington are entitled to absolute vested interests under this clause of the will, and the Court decreed as follows: "That by the proper construction of the will of Catharine Harper, deceased, the obligation now devolves upon Thomas Hughes, Trustee, in consequence of all the children of Emily L. H. Pennington, deceased, being over twenty-one years of age, to distribute between her two sons, R. G. Harper Pennington and Clapham Pennington, equally, the estate in the hands of said trustee, and he shall so distribute the same accordingly, selling so much as he shall find necessary for such distribution, whereby there shall be distributed to and received by the said R. G. Harper Pennington one-half of said estate, and Clapham Pennington the remaining one-half of said estate, each for his own use, and as his own property absolutely, except, however, that the said trustee shall retain

in his hands, pursuant to the deed of trust to him from the said R. G. Harper Pennington, in favor of his children, one-half of the said R. G. Harper Pennington's share." From that decree the trustee, by authority of the lower Court, took this appeal.

In our judgment that decree is clearly right. If clause (b) stood alone, there could be no possible question about it. Mrs. Pennington, the life tenant, died leaving two sons and no descendants of a deceased child, and hence the income of the said third part, as it became due, was applicable to the support, maintenance and education of those two sons for the term of twenty-one years after the death of their mother, *or* until the youngest of them attained the age of twenty-one years, *whichever first happened*; and the principal of said third was then to be distributed amongst them. As both of her sons have attained the age of 21 years (which happened before the end of 21 years after her death), the will explicitly directs "that the principal of said third be then distributed amongst them *per stirpes*," and they are undoubtedly entitled to now have the principal of the estate, unless clause (c) prevents.

That clause can not prevent the distribution, unless we not only ignore the alternative provision in reference to the youngest child becoming of age, but disregard the express direction that the principal be *then* distributed (that is to say, when the youngest son became twenty-one years of age). It can not be said that the testatrix intended that, even after the principal is distributed to the two sons, if they died within twenty-one years after their mother's death, their respective shares would be divested and go to their aunt, if living, or if she be not living, to such persons as she might by will appoint, and thus cut out the children of Mrs. Pennington's two sons. That would not only be an unnatural provision, but it might have been a useless one, for the child, children, or descendants of Mrs. Pennington, who reached the ages named, might have spent or lost the principal distributed to them, and it is evident from the will

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that the testatrix was careful to preserve the estate in the hands of trustees until the time came for its final distribution. Sometimes testators do leave property to a child in such terms as make it defeasible upon the child dying without leaving a child, or, if she leave a child, upon its dying before attaining the age of twenty-one years, as shown by *Devecmon v. Shaw*, 70 Md. 219, and similar cases which might be cited, but that was manifestly not intended by Mrs. Harper.

Inasmuch as clause (b) uses the term "child, children or descendants," or in one instance speaks of children and grandchildren, it was argued by the appellees that clause (c), which only uses the term "descendants," was not intended to apply to a child or children of Mrs. Pennington, but only in the event that there were no children to take. But in our judgment, the correct interpretation of clauses (b) and (c), when taken together, is that the testatrix provided in clause (b) for two dispositions of the remainder after the death of Mrs. Pennington, in case she left a child or children or descendants of a child or children living at her death. One was that the income be applied to the support, maintenance and education of such child, children or descendants, *per stirpes*, for the term of twenty-one years after the death of Mrs. Pennington, and that at the expiration of twenty-one years, the principal of said third be distributed amongst them *per stirpes*. The other was a qualification of or exception to the first, and was that if the youngest child of Mrs. Pennington living at her death (or if she left no child, the youngest grandchild) became of age (female, 18, and male, 21) before the term of twenty-one years after her death ended, then the income was to be applied as therein directed until such youngest child (or grandchild) attained the age mentioned (female, 18, and male, 21), and then the principal of the third was to be distributed.

In the event last mentioned there was no contingency to be provided for, because if she left children (or grandchild

but no child), and the youngest was of the prescribed age before the end of twenty-one years after her death, the principal of the third was to be *then* distributed by the express and clear direction of the will. Nothing more was to be done. But it naturally occurred to the draftsman of the will that some provision must be made in case Mrs. Pennington left no descendants, or if she did leave some and all of them died before the expiration of the twenty-one years after her death, and hence clause (c) was added. It is, however, clear that those provisions were intended to apply to the class first contemplated by clause (b)—that is to say, where the income was to be paid for the term of twenty-one years, and not to the one where the testatrix had directed the principal to be paid, although the twenty-one years had not expired, as the youngest child had attained the age fixed by her.

That construction harmonizes the terms of the will, makes all of them effective, and is in accord with what we believe to be the manifest intention of the testatrix. As Mrs. Pennington did leave two sons and both of them are twenty-one years of age, they would be entitled to have the principal of the third distributed to them at once, but as it appears that R. G. Harper Pennington made a deed of trust in favor of his children of one-half of his share, the decree provided that the trustee should retain that half. The deed of trust is not in the record, but as no question is made about that, we assume that as Mr. Hughes is trustee under the will of Mrs. Harper and also under the deed of trust, that was satisfactorily arranged.

The decree will be affirmed, but the costs will be directed to be paid by the trustee out of the estate.

Decree affirmed, the costs to be paid by the trustee out of the estate.

Md.]

Syllabus.

MAYOR AND CITY COUNCIL OF BALTIMORE, A
MUNICIPAL CORPORATION,*vs.*

ANNIE E. KANE ET AL.

Condemnation proceedings: no right of removal.

A proceeding to condemn land is an action at law. Such proceedings are not according to common law, but are in derogation of private rights, and wholly dependent upon statutory regulations and provisions. p. 137

No right of removal in condemnation cases having been given by the Constitution, or by statute, no such right exists in cases of this character. p. 140

In condemnation proceedings, where the question of the necessity, *vel non*, for the acquisition of the property by the City of Baltimore, was allowed to go to the jury, and a verdict and judgment entered, it would be too late to apply for a removal, even conceding that the right existed. p. 140

Decided January 14th, 1915.

Appeal from the Circuit Court for Baltimore County.
(BURKE, C. J., and DUNCAN, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, URENER, STOCKBRIDGE and CONSTABLE, JJ.

S. S. Field, City Solicitor, for the appellant.

T. Scott Offutt (with whom was *Robert H. Bussey* on the brief), for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

This is a proceeding instituted by the Mayor and City Council of Baltimore on the 15th June, 1912, in the Circuit Court for Baltimore County, to condemn certain land in the Gunpowder Valley for "augmenting and improving the municipal water supply of Baltimore City." The answer of the defendants to the petition denies the necessity for the acquisition of the land for the purpose named, and this question was submitted to a jury in Baltimore County, which, by its verdict rendered on the 27th June, 1913, found the existence of the necessity, *i. e.*, that the City was entitled to have the land, which verdict was followed by a judgment in accordance with the verdict on the 16th July, 1913. Thereafter an order was passed appointing appraisers to value the land desired to be acquired by the City, and their report was filed. Exceptions to the return of the appraisers, both by the Mayor and City Council and the land owners, followed next in order, and thereafter the City filed its suggestion and affidavit for the removal of the case under section 8 of Article IV of the Constitution. The Circuit Court refused to grant the application for removal, and it is from the action of the Court in that respect, that the present appeal is taken. There is involved, therefore, but the single question, whether or not a proceeding for the condemnation of land is such a one, as entitles either party upon making affidavit that he or it cannot have a fair and impartial trial in the Court in which the same may be pending, to have the case removed to some other jurisdiction.

The issue is a narrow one and was fully and ably presented by counsel upon both sides, both in the oral arguments and in their briefs.

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The constitutional provisions, insofar as it is applicable to the present case, is as follows:

"The parties to any cause may submit the same to the court for determination without the aid of a jury, and in all suits or actions at law, issues from the Orphans' Court or from any court sitting in equity, and in all cases of presentments or indictments for offenses which are or may be punishable by death pending in any of the courts of law of this State having jurisdiction thereof, upon suggestion in writing under oath of either of the parties to said proceedings, that such party can not have a fair and impartial trial in the court in which the same may be pending, the said court shall order and direct the record of proceedings in such suit or action, issue, presentment or indictment, to be transmitted to some other court having jurisdiction in such case, for trial."

The vital words involved are "all suits or actions at law." The contention upon behalf of the City may be summed up in a very few words, namely, That a proceeding of this character is an action at law, and that being an action at law, it comes within the terms of the constitutional provision giving a right of removal.

It is not open to question in this State that a proceeding to condemn land is an action at law. That has been distinctly held in the case of *Ridgely v. Baltimore City*, 119 Md. 567, and earlier cases. The proceeding is not one according to the common law, and is in derogation of private right, and wholly dependent upon statutory regulation and provision. *Fork Ridge Cemetery Co. v. Redd*, 33 W. Va. 262, cited in 1 *Lewis on Eminent Domain* (3rd Ed.), section 387. But in any case the proceeding is a judicial one, and involves the exercise of judicial power; 15 *Cyc.* 807; *Ridgely v. Balto. City, supra*. In some jurisdictions it is held to be a proceeding *in rem*, but it is described with more accuracy in *Chandler v. R. R. Commrs.*, 141 Mass. 212, where it is said

that, "it is not a proceeding *in rem*, although in some respects resembling such a proceeding." It is rather in the nature of an inquest, to determine (1) the necessity upon the part of the City for the acquisition of the land described in the petition, and if this necessity is found to exist, then (2) the proper compensation to be paid to the owners for the land so to be taken. The power of the city to acquire lands for the purpose specified in the petition by resort to condemnation is fully conferred by Chapter 214 of the Acts of 1908, p. 649, and by section 6 of the Charter of the City, as framed in 1898, and the procedure to be followed in such cases was fully set out in the Acts above named, and Chapter 32 of the Acts of 1912. That procedure involved the application upon the part of the City to a justice of the peace of the county in which the lands were situate, to issue his warrant to the sheriff for the summoning of a jury, and then after certain other proceedings, it provided that "the said jury shall reduce their inquisition to writing and shall sign and seal the same, and it shall then be returned by said sheriff to the clerk of the Circuit Court for said county, and be filed by such clerk in his office, and shall be confirmed by said Court at its next session, if no sufficient cause to the contrary be shown; and when confirmed shall be recorded by the said clerk at the expense of the City."

By Chapter 117 of the Acts of 1912 a somewhat different method of procedure was provided to be followed in cases of condemnation, the material element in which was, that the application was to be made in the first instance to the Court, instead of to a Justice of the Peace. This Act, however, affected no substantive right of either the land owner or the condemning party, it related only to the method of procedure to be pursued in such a case. As has already been pointed out, the proceeding for the condemnation of land was one involving the exercise of judicial power; that power was necessarily applied prior to the adoption of the Act of 1912; in that there was required the confirmation of the

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inquisition of the jury by the Court and the same power is equally involved under the provisions of the Act of 1912. Provision was made in both cases for the filing of exceptions, either to the inquisition of the jury, or the return of the appraisers, and the condemning party could acquire no rights under the proceeding in either event, until after the confirmation of the inquisition or appraisement by the Court. The distinction attempted to be drawn by the City Solicitor, that prior to the Act of 1912 the Court in reality sat as an appellate tribunal, but under the Act became a Court of original jurisdiction, is without force.

This Court does not understand that it is seriously contended that any right of removal is claimed to have existed prior to the passage of the Act of 1912, but whether this is true or not is of slight importance. The right of condemnation being one purely of statutory creation, is one to be strictly construed, and where the Legislature which has conferred the right has also laid down the mode of procedure for the acquisition of property under it, that method and none other is the one to be followed.

It is not every case on the law side of the Court in which the parties are entitled to a removal upon the suggestion and filing of affidavit specified in the constitution. It has thus been repeatedly held that an equity case may not be removed from one jurisdiction to another; *Hoshall v. Hoffacker*, 11 Md. 364; *Cooke v. Cooke*, 41 Md. 362; nor appeals from a Justice of the Peace, *Geekie v. Harboured*, 52 Md. 460; nor an application for the forfeiture of a charter, *Bel Air Club v. State*, 74 Md. 297; nor an appeal from the Commissioners for Opening Streets, *Chappell v. Edmondson Ave. Co.*, 83 Md. 512.

As a result of a somewhat peculiar phraseology of the statute a change of venue has been allowed in Minnesota and Missouri in cases of condemnation of lands, while in California in a water case, under a statute not very dissimilar from the one now involved, the removal of such a case was held to have been correctly refused. *Santa Rosa v. Fountain*

Water Co., 138 Cal. 579. When we turn to the statutes in this State we find no provision whatever enacted by the Legislature providing for the removal of a condemnation case; nor in the opinion of this Court is such a case one in which the right of removal exists under the phraseology of the constitution, unless that right be expressly conferred by statute. In that respect it is quite analogous to the case of *Gardiner v. Baltimore City*, 96 Md. 361, in which it was held that no right existed in the municipal corporation to appeal from an award of damages, in the absence of statutory authorization for such appeal. The reasoning of the Court in that case is equally applicable in the present one.

But again, as appears by the record in this case, the initial question of the necessity for the acquisition of the property having been determined in favor of the City, and that by the verdict of the jury, it was at least equivalent in effect to a judgment by default, and, therefore, it comes directly under the rule as applied in *Northern Central Railway v. Rutledge*, 41 Md. 372, where it was laid down, that where a judgment by default had been entered, and the sole question remaining was the inquisition of damages, it was too late to invoke the constitutional right of removal.

The question of first importance here was the existence, *vel non*, of the necessity for the acquisition of the property by the City. If upon the petition for a condemnation being filed, the defendants had by inaction permitted a judgment by default to go against them, it would have presented the exact question that was before this Court in the *Rutledge case*, and *a fortiori* when after hearing, a verdict and judgment had been entered in favor of the City, with even greater reason an application for removal came too late, granting for this purpose only, that there ever was a time when the case could have been removed.

The judgment of the Circuit Court for Baltimore County will therefore be affirmed.

Judgment affirmed, with costs.

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Syllabus.

ROBERT H. GREEN

vs.

LYDIA M. GREEN.

Divorce: remedy for innocent parties; none where complainant is guilty of wrong that could bar his suit. Equity: clean hands.

The maxim that "he who comes into equity must come with clean hands," is applicable in suits for divorce. p. 145

Divorce is a remedy provided for an innocent party, and any misconduct on the part of the complainant which constitutes a ground for divorce will bar his suit, without reference to the nature of the offense of which he complains. p. 143

If the proof discloses that both parties to the cause have grounds for a divorce, a decree should be granted to neither. p. 144

Decided January 14th, 1915.

Appeal from the Circuit Court of Baltimore City. (ELLIOTT, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE.

Henry H. Dinneen, for the appellant.

No appearance for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

Robert H. Green, the appellant, filed his bill in the Circuit Court of Baltimore City for a divorce *a vinculo matrimonii* from Lydia M. Green, his wife, upon the ground of abandonment. The bill alleges, and the proof substantiates it, that the parties were married in November, 1908; that for no apparent reason on the 7th of May, 1909, the defendant abandoned her husband, and this desertion has continued uninterruptedly ever since, and is without reasonable expectation of reconciliation.

In the course of the proof the plaintiff was asked by the examiner, whether since his wife had been away from him, he had even been with other women, and the witness answered, Once, three or four years after the abandonment happened.

Upon the submission of the papers in the case to the auditor and master, Mr. Robertson reported that the bill should be dismissed, relying upon the case of *Fisher v. Fisher*, 95 Md. 316. Exceptions were filed to this report, which, after hearing, were dismissed, and the bill of complaint was also dismissed. It is from such decree of dismissal that the present appeal is taken.

Lydia M. Green made no defense in the Circuit Court to the charge of desertion; although summoned, she did not appear, and a decree *pro confesso* was entered against her, and she has not been represented on this appeal.

The argument of the counsel for the appellant is apparently based upon two grounds: (1) that the abandonment of the wife was the inciting cause of the subsequent act of adultery upon the part of the husband; and (2) that the statutory period of desertion having elapsed before the act of adultery

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was committed, the right of the plaintiff had become fixed and could not be affected by his subsequent act. In support of his position he cites numerous authorities, some of which are applicable and some not, but the question involved in the case is of sufficient importance to make a review of the more important authorities appropriate.

Taking first the text books, we find the rule stated in 14th Cyc. 650, that "any misconduct on the part of the complainant which constitutes a ground for divorce bars his suit, without reference to the nature of the offense of which he complains," but adds, "in some States by statute or otherwise a contrary rule prevails and the offense must be of the same character." In the present case under the Maryland statute the desertion set out in the bill, and proved by the evidence, was a sufficient ground for the granting of an absolute divorce. Also the adultery of the husband constituted a sufficient ground under the statute for which Mrs. Green, if she had seen fit, might have filed her bill, and if the proof substantiated the allegations, have obtained an absolute divorce. If, therefore, the rule as stated in 14 Cyc. is supported by the authorities, there can be no question but what the decree of the Circuit Court in dismissing the bill was correct.

In *Nelson on Divorce and Separation*, sec. 429, the statement is as follows: "It is a general rule almost without exception (the reference here is to *Ristine v. Ristine*, 4 Rawle, 460) that one who has committed adultery does not come into Court with clean hands, and is not entitled to divorce for any matrimonial offense. This was the doctrine of the Ecclesiastical Court. If the plaintiff had committed adultery he could not complain of his wife's adultery. No decree of divorce can be obtained for cruelty if the plaintiff has committed adultery. Adultery is also an absolute bar to relief for desertion."

In 2 *Bishop on Marriage, Divorce and Separation*, sec. 350, it is said: "By all opinions, English and American, one

shown to have been guilty of adultery can not have a divorce for adultery committed by the other, and it makes no difference which was the earlier offense, or even that the plaintiff's followed a separation which took place on discovery of the defendant's."

In *Brown on Divorce*, page 84, the rule is laid down as follows: "Where each of the parties has committed a matrimonial offense which is a cause of divorce, so that when one asks for this remedy, the other is equally entitled to the same, whether the offenses are the same or not, the Court can grant the prayer of neither.

In *Stewart on Marriage and Divorce*, sec. 314, the rule is concisely stated as follows: "Divorce is a remedy provided for an innocent party. If both parties have a right to a divorce, neither has."

If now we turn from the text writers to the adjudicated cases, we find a wide diversity of decisions, much greater than the statements in the text books give any indication of. The case most frequently cited is the *Ristine case*, in 4 Rawle, 460, decided in 1834, in which it was held that adultery committed by a husband after a wife had separated herself from him was no bar to his obtaining a divorce in consequence of his wife's wilful and malicious desertion and absence without reasonable cause for two years, and the same rule was subsequently followed in Pennsylvania, in the case of *Mendenhall v. Mendenhall*, 12 Pa. Sup. Ct. 290; but it is to be observed in connection with these cases, that they were both decided upon the supposed necessity to observe certain established rules of statutory construction, and the same may be said of the decision in the case of *Buerfening*, 23 Minn. 563. Other Pennsylvania cases, however, are not in accord with the doctrine of the *Ristine case*; thus in *Vellis v. Vellis*, 4 Pa. Co. Ct. 100, it was held that a decree of divorce on the ground of desertion would not be granted to a wife where it appeared by her own evidence that she was delivered of a bastard child begotten after the desertion, the Court saying; "the libellant

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is not an innocent and faithful wife. She does not come into the court with clean hands. Recrimination established by herself is a bar to her suit. * * * Divorce is a remedy provided for the innocent party, and is not intended for cases in which both parties are guilty." In that case, as in this, the defendant was entirely unrepresented. This case was subsequently followed, though not referred to, in the case of *Hugo v. Hugo*, 21 Pa. Co. Ct. 607, where it was held that where a husband and wife have both committed matrimonial offenses, which would justify a decree of divorce, whether the offenses are the same or not, the Court will grant the prayer of neither. *Leidig v. Leidig*, 13 Pa. Co. Ct. 29, cited by the appellant, was based upon the *Ristine case*, and is not entirely applicable. The real question there was, whether or not the act of adultery committed by one of the parties was a sufficient justification for desertion by the other, and it was so held to be.

Without reviewing *seriatim* the cases in North Carolina. it will be sufficient to say, that they are in accord with the *Ristine case*, but, like that case, were decided upon the construction of the statute of that State.

Williamson v. Williamson, 46 L. T. R. (N. S.), 920, is hardly an authority for the proposition advanced by the appellant. In that case the complaint was filed by the husband, and it set forth that shortly after the marriage, the wife was arrested and convicted of a felony; that on the expiration of her term instead of returning to her husband she took service, and while so in service committed the act of adultery, and the Court held that no act of the husband had conduced to her adultery, and he was granted the divorce; but there was no suggestion in the case that he had been in any way in fault.

In the case of *Snook v. Snook*, 67 L. T. R. (N. S.), 389, there had been a decree of divorce *nisi*, and the husband, who had so obtained the divorce, was told by his solicitor that he might marry again after the expiration of six months; he did so after the expiration of that time, although the decree had

not been made absolute, and it was held that he had acted in ignorance of the law, had no intention of committing adultery, and that notwithstanding his second marriage amounted to adultery, a discretion would be exercised in his favor and the divorce made absolute.

In the case of *Moors v. Moors*, 121 Mass. 232, an almost similar condition was presented. A decree *nisi* of divorce had been entered, to become absolute after the expiration of six months. The complainant believing the divorce to be absolute, married another woman, and had intercourse with her, and the Massachusetts Court held that this was an act of adultery, so as to disentitle him to have the *nisi* decree made absolute.

In *Cumming v. Cumming*, 135 Mass. 386, it was held that, "a suitor for divorce can not prevail if open to a valid charge of any matrimonial offense whatever of equal grade," and to the same effect is *Handy v. Handy*, 124 Mass. 394.

Directly in point, as bearing upon the second ground urged by the appellant, is the case of *Mathewson v. Mathewson*, 18 R. I. 456, where it was held that a divorce will not be granted when it appears that the petitioner, although otherwise entitled to a divorce, has been guilty of conduct that is cause for a divorce. So where a man had deserted his wife and enlisted in the military service, writing to her but once or twice soon after his enlistment, and then remaining silent for twenty-seven years, and she believing him to be dead by reason of common report, married again, after which the first husband appeared with another wife and several children, but the plaintiff continued for a short time to live with her second husband, then ceased to cohabit with him and applied for a divorce from her first husband, she was held not to be entitled to the divorce because she was guilty of conduct authorizing a divorce after she knew that her first husband was alive.

In *Wheeler v. Wheeler*, 18 Or. 261, where the party seeking the divorce was liable to a charge which was a cause for

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divorce, it was held that fact would prevent him from obtaining a divorce even though the wife had likewise been guilty of misconduct. The same rule was affirmed in *Earle v. Earle*, 43 Or. 293.

The case of *Whippen v. Whippen*, 147 Mass. 294, presents many points of similarity to the present case. The husband in that case had been deserted by his wife for seven years, and had no actual knowledge that she was alive. He went through a form of marriage, which was fully consummated; then learning that his first wife was still alive, applied for a divorce from her. She did not appear or make any defense to the suit. The conclusion of the Court was, that by his act he had been guilty of adultery and was, therefore, precluded from obtaining a divorce for the desertion.

In *Smith v. Smith*, 4 Paige, 432, after the complainant had filed his bill for divorce, he was guilty of an act of adultery, and this was brought to the knowledge of the Court by a supplemental answer filed by the wife, and the fact of such adultery, irrespective of the merits of the original bill, was held to preclude him from the relief which he sought.

Peculiarly apposite to the present case is the decision in *Tracey v. Tracey*, 43 Atl. Rep. 713, where the following language is used by VICE CHANCELLOR GREY of New Jersey: "All cases, however, declare that if the complainant in proving his case discloses his own guilt the Court will refuse him relief, even if his misconduct be not pleaded against him. The complainant can not exhibit to the Court his own breach of his marriage vows and successfully ask for relief because of the defendant's failure in marital duty. He comes into the Court with unclean hands and can not rightfully ask its aid. In the case before us, the complainant's breach of his marriage vows appears in his own proof by his own oath. The bill should be dismissed."

In concluding this review of the decisions, they can not be better summarized than was done by the Court of Appeals of Colorado, in *Redington v. Redington*, 2 Col. App. 8, 29

Pac. Rep. 811: "In the hopeless conflict among the authorities, both English and American, we must follow what seems to be the current of the main stream of judicial determination, influenced perhaps by our own judgment of what the law should be in such cases. It is the conclusion of this Court that the *Ristine case*, *supra*, and the *Buerfening case*, 23 Minn. 563, are not in harmony with the general doctrine of the American Courts"; and to the cases named, should properly be added the decisions in North Carolina, and a few isolated decisions in other States.

From this summary it follows that the Judge of the Circuit Court committed no error in overruling the exceptions of the complainant to the report of the master, and dismissing the bill, and the decree will accordingly be affirmed.

Decree affirmed, with costs.

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Syllabus.

GEORGE W. EWING AND BETTIE SHIRLEY EWING.

vs.

HOWARD L. RIDER.

Trespass q. c. f.: damage to growing crops; measure of—; evidence; value of balance of crop when matured. Appeals: reversals; harmless errors; joint judgment; reversed or affirmed as a whole.

In an action for damages to growing crops, the measure of damages is the value of the crop at the time of its destruction; but in determining this amount, the evidence of the probable yield and value of the crop, had it reached maturity, and proof of the value of the part of the crop that was not destroyed, is admissible. p. 155

A harmless error in the ruling of a trial court, presents no ground for a reversal. p. 152

Recovery in an action for injuries to crops by trespass is limited to injuries occurring during the three years before the commencement of the suit, provided the defense of limitations is specially pleaded. p. 152

It is the fundamental principle of the law of damages, that a person injured in his personal or property right shall be compensated therefor. p. 155

A judgment against joint defendants is an entirety; and, on appeal, must be affirmed as to both, or reversed as to both; and if only one party is liable, the judgment can not be reversed as to him without a new trial, but must be remanded with a new trial for both. p. 156

Decided January 20th, 1915.

Appeal from the Circuit Court for Harford County. (HARLAN, J.), to which Court the case had been removed from Baltimore County.

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Aubrey Pearre, Jr., (with whom were *Barton, Wilmer & Stewart* on the brief), for the appellants.

Elmer J. Cook (with whom was *Sterenson A. Williams* on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This action was instituted in the Circuit Court for Baltimore County, on the 6th day of April, 1912, but upon removal the case was subsequently tried in the Circuit Court for Harford County and resulted in a verdict for the plaintiff for the sum of two hundred and fifty dollars.

The appellee was the plaintiff below, and he brought this suit against the defendants (husband and wife) to recover for injury and damage to, his growing and harvested crops of corn, wheat, hay and grass for the period of four or five years alleged to have been committed by the chickens, and other poultry, of the defendants, as set out in the plaintiff's *narr.*

The declaration contains three counts. The first is the usual count in trespass. The second alleges, that the defendants suffered and allowed, to run loose on the lands and crops of the plaintiff, where the same lies adjacent to the land of the defendants on the north side of the Dover Road in the 8th Election District of Baltimore County, large flocks of turkeys, chickens, ducks and geese, to the number of at least 150, and that said turkeys, chickens, ducks and geese did each year for the past four or five years destroy at least four or five acres of the growing crops of the plaintiff; that

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the plaintiff repeatedly notified the defendants during the said four or five years to keep said turkeys, chickens, ducks and geese off the said lands of the plaintiff, but the defendants wholly neglected so to do, to the great injury and damage of the plaintiff.

The third count is identical as the second, except it charges that large quantities of harvested crops while cut, and remaining in the fields of the plaintiff were each year for the past four or five years destroyed by the poultry of the defendants.

The plaintiff upon demand, filed a bill of particulars, setting out the damages claimed under each count of the declaration, specially naming the years in which the damage occurred and fixing it at the sum of \$689.00.

The defendants for joint and several answers to the declaration pleaded, first, that they did not commit the wrong alleged, and, second, that the alleged cause of action and the damages for the years 1908 and 1909, did not accrue within three years before the suit. A trial was had upon a replication to these pleas, and from a judgment against both of the defendants, this appeal is taken.

The questions for our decision are presented upon two exceptions and were taken to the action of the trial Court, first, in its ruling upon the admissibility of evidence, and, second, upon the prayers.

The first exception requires but little discussion and there can be no difficulty in disposing of it.

The defendant, George W. Ewing, testified upon cross-examination, as set out in the exception, that he had no profession, no business occupation, but is an alleged farmer on 48 acres. He stated, he meant by this, he farmed the place for the benefit of the place, that the whole 48 acres is farmed, and that he keeps hunting horses. He was then asked, "How many do you keep?" The question was objected to by the defendants and the objection being overruled, the witness answered that he kept four such horses, and this constitutes the entire exception.

While it is difficult to perceive the relevancy of a question of this kind, to the issues of the case, it is clear, that the answer could not have injured the defendants. The witness had testified without objection, that he kept hunting horses, and the reply that he kept four such horses, could have no prejudicial bearing upon the case. Even if the ruling could be held to be error, it manifestly would be only harmless error, for which a reversal of the judgment would not be granted.

The second exception presents the rulings of the Court. upon the prayers.

The plaintiff offered no prayers, but the defendants presented thirteen. Of these, the Court granted the seventh and eighth, and refused the rest. The rulings upon the rejected prayers form the basis of this exception.

By the eighth granted prayer, the jury was properly instructed that under the issues joined there was no legally sufficient evidence, upon which the plaintiff could recover for any damage accruing to him prior to the 6th of April, 1909.

The suit was instituted on the 6th of April, 1912, and the Statute of Limitations, under the pleadings and evidence was a clear bar to the recovery of any damages, prior to the 6th of April, 1909, as directed in the eighth prayer.

The proposition contained in the second and fifth prayers of the defendants were fully covered by their eighth prayer, and no injury resulted from their rejection.

The third prayer prevented the recovery of any damages for the whole of the year 1909, if any, as against the defendant George W. Ewing, whereas limitations only applied up to April 6th, 1909, as set out in the eighth granted prayer. The third prayer was therefore properly refused.

The first, fourth, sixth, ninth, tenth, eleventh, twelfth and thirteenth prayers offered on the part of the defendants were demurrers to the evidence and by them the Court, was in substance, asked to instruct the jury, first, that there was no

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evidence in the case, legally sufficient to entitle the plaintiff to recover any damage whatever for the alleged injury to and destruction of the crops by the defendant's poultry, and, **secondly**, if any recovery at all, the plaintiff was limited to no more than nominal damages.

As the first prayer directly presented the question of the liability of Mrs. Ewing for the damages sought to be recovered, we will first consider the rulings of the Court below, upon this branch of the case.

We have carefully examined the evidence, set out in the record now before us. and are unable to agree with the ruling of the Court below in rejecting this prayer, but we are of opinion, that the jury should have been instructed under the pleadings and evidence in the case, there was no evidence legally sufficient to entitle the plaintiff to recover against her, and that a verdict must be in her favor.

There was no evidence legally sufficient to show that Mrs. Ewing owned any of the poultry, or was in any way, responsible for their care and custody, at the time of the alleged trespass.

The plaintiff testified, that Mr. Ewing exercised ownership over the farm, on which the poultry was kept and that he "requested him to keep his poultry up," told him they were doing him a great deal of damage. In a letter to him, he writes, "Probably, Mr. Ewing, you don't know your poultry is doing me a great deal of damage, but such is the fact and I am sure you will keep them up from this time on." He further testified that he wrote to him a number of times and asked him "to keep his chickens up" and stated to him, "I don't think I have a right to fence against your stock."

The testimony of Mr. Ewing is to the effect that he farmed the place and that the poultry belonged to him and not to Mrs. Ewing. He testified that in 1909 he kept 40 to 60 laying hens, and did not raise any additional chickens that year. In 1910 he expected that the number of chickens decreased some; in 1909 he kept probably on an average

about 30 to 40 chickens, but not over that; his first chicken house was built in 1910, and since then he has erected a portable chicken house. Originally he had two drakes and eight hen ducks, and has six or seven ducks now. In 1909 he had four turkeys all together, and in that year raised perhaps fifteen or twenty turkeys, keeping only a few and eating the rest; started with two geese and now he has three. Testified he has seven guineas, and since 1909 the guineas have decreased. That since 1909 turkeys have also decreased, and the greatest number of turkeys he ever had at one time was 12 hens and two gobblers.

He further testified that in the talk he had with the plaintiff in March, 1912, he told him he could not keep his chickens in and proposed to put up a fence on Rider's side of the road and that he would pay for half of it.

The witness McCann testified that he had directions from Mr. Ewing to keep the poultry up, and that Mr. Ewing owned the poultry.

But it is urged upon the part of the appellee, that the plaintiff's answer to the following question was sufficient to take the case to the jury, upon the question of the ownership of the poultry: "Q. Now, did you suffer any damage from poultry of the defendants; if so, please state to the jury what damage you suffered? A. Well, they did me a great deal of damage every year, and I notified Mr. Ewing in writing. I wrote no less than three letters."

While it is true, that the question suggests that it was the poultry of the defendants, we are unable to agree with the view, that the answer when considered as a whole can be regarded as of such probative force as tending to prove that the poultry was the property of both defendants. The witness also stated, in the same answer, that "I notified Mr. Ewing in writing," and it will be seen that this writing spoke of the poultry, as the property of Mr. Ewing.

The testimony here relied upon to prove the liability of Mrs. Ewing as one of the owners of the poultry, we think,

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was entirely too vague, light and inconclusive, standing alone, to have taken the case to the jury as against her, and the defendant's first prayer should have been granted. *Cole v. Hebb*, 7 G. & J. 29; *Vogeler v. Devries*, 98 Md. 306; *Jones v. United Rwy. Co.*, 99 Md. 67.

This brings us to the second proposition in the case, namely, the liability of the defendant, George W. Ewing.

It is conceded in the appellant's brief, that under the evidence in this case the plaintiff was entitled to recover against the defendant, George W. Ewing, but not more than nominal damages, for the trespass committed.

Without stopping to discuss the testimony in detail, we think, there was sufficient evidence to require the Court to submit the case to the jury as to him, and there was no error in rejecting the defendant's prayers, which limited the plaintiff's recovery to nominal damages only.

There was evidence that both the growing and harvested crops of the plaintiff had been injured and damaged by the poultry of the defendant, during the years 1909, 1910 and 1911. There was evidence as to the fact of loss, the amount of damages and the value of the crops at the time of their injury and destruction, and it was upon this evidence and the other evidence in the case that the jury was justified in finding a verdict, if they determined the plaintiff was entitled to recover. In *A. & E. Enc. of Law*, Vol. 8 page 544, it is said, the fundamental principle of the law of damages is that the person injured in his person or property rights shall receive compensation therefor.

In 13 *Cyc.*, page 208, it is said, the measure of damages in an action for growing crops is the value at the time of their destruction; yet in determining this amount, evidence of the probable yield and the value of the crop, had it progressed to maturity, is admissible, and proof of the yield in that part of the field not destroyed, or of the value of matured crops of the variety destroyed, is admissible." *Sutherland on Damages*, Vol. 4, sec. 382; *A. & E. Enc. of Law*, Vol. 13.

709; *B. & O. v. Lamborn*, 12 Md. 257; *Carter v. Md. & Pa. R. Co.*, 112 Md. 599; *Balto. Bldg. Asso. v. Grant*, 41 Md. 560.

It follows from what we have said, that we find no reversible error in the action of the Court in rejecting the defendant's fourth, sixth, ninth, tenth, eleventh, twelfth and thirteenth prayers, but for the error indicated in its ruling on the first prayer, the judgment must be reversed.

As there was but one verdict and judgment in this case, it must be according to our practice, affirmed as a whole or reversed as a whole. *Hanley v. Donoghue*, 59 Md. 239; *Hanley v. Donoghue*, 116 U. S. 1; *Lumber Co. v. Israel*, 100 Md. 690.

In *Willner v. Silverman*, 109 Md. 360, it is said: "Although, in our opinion, the evidence, as set forth in the Record, is legally insufficient to entitle the plaintiff to recover as against Harris Silverman and Louis Silverman individually, or against the firm of Harris Silverman & Sons, yet, as the judgment is an entirety which cannot be affirmed as to some and reversed as to other defendants, we must, for error in granting the defendant's first prayer, simply reverse the judgment and remand the case for a new trial."

In *Firor v. Taylor*, 116 Md. 84, it was also said: "Although we are of the opinion that the third prayer offered by Saxton should have been granted, we will not reverse the judgment without awarding a new trial as to him, but as there was a joint judgment against the two, we will follow the practice of this Court in such cases and award a new trial as to both." both."

*Judgment reversed and new trial awarded
as to both defendants, the appellee to
pay the costs.*

Md.]

Syllabus.

AVERY TODD MALONE

vs.

ANNIE R. TOPFER.

Seduction: who may maintain action for—; parents; loss of right. Judgment: striking out; during term; valid reasons must always be assigned.

A parent may destroy the rights of the relation of master and servant by abandonment, neglect or cruelty; but in what manner and by what acts this can be done, must depend upon the special circumstances of each case. p. 161

During the minority of a child, anyone standing *in loco parentis*, in whose service she is, may maintain an action for damages for the loss of services through her seduction by the defendant. p. 160

A father had abandoned his family, and been divorced from his wife; he contributed practically nothing to the daughter's support, and neither received nor claimed any service from her; the daughter lived with and helped the mother: *Held*, that in such a case, the mother could maintain an action for her seduction. p. 162

When passing upon motions for striking out judgments which are made during the term, courts usually act liberally; but such judgments are not to be stricken out whenever such a motion is made during the term, nor as a mere act of form or caprice; but there must always be reasonable proof of circumstances which make it inequitable that the judgment should stand. p. 163

The fact that an action growing out of the same cause has been instituted by another party, is no ground for striking out a judgment, especially when it appears that such other action could not be maintained. p. 164

Decided January 20th, 1915.

Two appeals from the Circuit Court for Dorchester County. (PATTISON, C. J., JONES and STANFORD, JJ.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Alonzo L. Miles (with whom was *E. Stanley Toadwin* on the brief), for the appellant.

Alexander M. Jackson, for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

The record in this case involves two appeals; one an appeal from a judgment rendered against the appellant in a suit for damages for the seduction of the minor daughter of the plaintiff; the other, an appeal from the action of the Circuit Court for Dorchester County in refusing a motion to strike out the judgment which had been entered. These appeals will be considered in order.

In the first appeal seven exceptions were reserved; six relating to evidence, and the seventh to the action of the trial Court upon the prayers; but they all present one and the same question, and need not be discussed in detail.

The material issue in the case is, whether the mother of a girl who has been seduced can maintain an action for damages for the seduction, the father being still alive, but the

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Opinion of the Court.

mother having been divorced from the father by a decree of a Court of competent jurisdiction. No question is involved in this case of the right of a father to sustain such an action, but the contention of the appellant is that the mother has no such right. Whether the mother, after the death of the father has a right of action for the seduction of a minor daughter, there being in fact no relation of master and servant between them, has been a matter of some discussion. The English Courts have held positively that no such right exists, and the Courts in this country are divided. In *Logan v. Murray*, 6 S. & R. 175, and in *South v. Denniston*, 2 Watts. 477, the right to maintain such action was expressly denied, it being said by GIBSON, C. J., in the latter case, that "nothing is more sure than that a mother is not entitled to the service of her child by the common law." So in *Bartley v. Richtmyer*, 4 N. Y. 38, BRONSON, J., says that in his opinion the mother has no such right; while in *re Rider*, 11 Paige, 185, CHANCELLOR WOOLWORTH is equally emphatic that the mother has the right. In *Gray v. Durland*, 50 Barb. 100, the question is ably examined and the decisions on both sides of the question presented, and the Court comes to the conclusion, that a mother has the same right to the services of a minor child that the father would have, if living. This is also the view of the Courts in Massachusetts (*Dedham v. Natick*, 16 Mass. 135); New Hampshire (*Hammond v. Corbett*, 50 N. H. 501); Connecticut (*Mathewson v. Perry*, 37 Conn. 435); New Jersey (*Coon v. Moffett*, 3 N. J. L. 436), and Tennessee (*Parker v. Meek*, 3 Sneed, 29). The lower Courts in New York favored the right of action by the mother, but the subject did not come before the Court of Appeals until *Furman v. Van Sise*, 56 N. Y. 435, when the Court passed on the question for the first time, and sustained the right of action by the mother, holding affirmatively a right to the service of the minor children by the mother, and thus overruling so much of the dicta of *Bartley v. Richtmyer*, as denied it. This case was subsequently approved in Massachusetts in *Blanchard v.*

Ilsley, 120 Mass. 487. So it may be concluded on the whole, that as a general proposition the right to maintain such an action on behalf of the mother is sustained.

The case of *Parker v. Meek*, *supra*, goes further than any of the other cases, and it is doubtful whether Courts in other jurisdictions would be prepared to go to the length the Court did in that case, as there a recovery was allowed on the suit of the mother for the seduction of a daughter who was an adult.

If we turn from the decisions elsewhere to those in this State, the important case is that of *Keller v. Donnelly*, 5 Md. 217, in which JUSTICE LE GRAND, after quoting from the case of *Mercer v. Wamsley*, 5 H. & J. 27, says, "But whatever may be the true character of the guardianship which the common law casts upon the mother, one thing is certain, that during the minority of the child *any one standing in loco parentis*, and she being in her service, may maintain an action."

None of the cases referred to, however, are cases in which the parents had been legally separated by a divorce, but both were still living at the time of the suit. They have all arisen where the father had died, either after the seduction, or in any case before the suit was brought. So far as the industry of counsel has been able to bring to the attention of the Court, or the examination which the Court has made, has extended, there has been no case in which the element, now presented of the parents being divorced has entered into it, and to this extent the case must be one of first impression. If the decree of divorce had in terms conferred the guardianship and control of the minor child upon either parent, it needs no argument to demonstrate that the parent to whom such guardianship had been committed would be entitled to bring and maintain the suit; but in this case the decree was entirely silent upon that point.

Whether either parent has by his or her act forfeited the parental rights with respect to their child, has several times

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been considered. If such be the case the parent so forfeiting his or her right, would thereby be debarred from maintaining such an action as the present one. That a parent may destroy the relation by abandonment, neglect or cruelty seems well established, but "in what manner and by what acts this can be done must depend upon the special circumstances in each case." *Greenwood v. Greenwood*, 28 Md. 381.

This makes necessary a summary of the facts brought out by the testimony. At the time when the divorce was granted, Mr. Topfer was in Philadelphia, Mrs. Topfer in Pittsburg on a visit, and the daughter, Hazel, in Salisbury with her grandmother, whom she helped in the performance of various household duties. The divorce was granted in January, 1912, and in the fall Mrs. Topfer returned to Salisbury. At that time Hazel had left her grandmother's home and was boarding with a Mrs. Coulbourn, her mother paying the board. While it is not directly so testified, the apparent occasion for this change was that Hazel had secured employment with the Telephone Company. Upon Mrs. Topfer's return to Salisbury, Hazel left Mrs. Coulbourn's, and thereafter made her home with her mother. The pay she received from the Telephone Company was small, and except upon one occasion, it was turned over to her mother, who used it in her home and in providing clothing for Hazel. In March, 1913, Hazel had to give up her position because of her condition, and from that time until her child was born in July she helped about her mother's house, cooking, washing, ironing and caring for two little girls. During all of this time, from January, 1912, to July, 1913, Mr. Topfer made no demand whatever upon her for any service, and so far as the evidence for the plaintiff discloses contributed nothing towards her support. When she was about to be confined her mother purchased some underclothing for her, a few infant's clothes, and took her to Baltimore to the University Hospital. After her confinement and the death of the child, she returned to Salisbury for a time, just how long does not clearly appear.

The defendant offered no testimony in contradiction of any of this evidence, but contented himself with the introduction of two letters written by Hazel, which showed nothing more than that the relations between mother and daughter were far from pleasant, that the latter was very unwilling to injure the defendant in any way, and that Mrs. Topfer made her daughter's life very unhappy.

Upon this evidence there is no room for argument that the mother was the parent who assumed sole control over the daughter, and that the rights of the father at common law were forfeited, if not abrogated. Upon the motion to strike out the judgment, the father was placed upon the stand, but he did not contradict any of the material allegations of the plaintiff. His testimony showed that from Philadelphia he had gone to Indianapolis, and then returned to Baltimore. That an irregular correspondence had been maintained between him and his daughter also appears. He claims to have sent her five dollars upon one occasion; on another to have bought her a dress, and to have paid her board for two weeks in Baltimore during the three months she spent there in the fall after her child was born. When she paid that visit, he told her, "You can stay here as long as you want to work and pay your board; the rest of the money you can keep for your clothes." He does not claim that she rendered him any service, or that he ever demanded any of her. Various letters from her to her father were offered, and even if these were admissible in evidence, which they clearly were not, they would show nothing more than the unhappy relations between the mother and daughter.

If this evidence of the father, which was not offered until the hearing of the motion to strike out the judgment, had been produced at the hearing of the case, it would not have established any right of service, due to him, which he had not forfeited by his abandonment and neglect. The action of the Circuit Court must, therefore, be sustained upon the main branch of the case.

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At the same term at which the judgment was entered a motion was made to strike it out, and six grounds were assigned. These can be briefly disposed of. The fifth was purely formal and calls for no comment. The law governing such applications is clearly and concisely stated by Mr. Poe (II Poe, sec. 392), when he says: "In passing upon applications to strike out judgments, when such applications are made during the same term at which the judgments were entered, our Courts usually act liberally; and upon reasonable proof of merit, and other equitable circumstances, strike out the judgments and let the defendant in to be heard." This does not mean that a judgment will be stricken out whenever asked to be, or as a mere act of favor or caprice, but that there must be reasonable proof of circumstances which make it inequitable that the judgment should be allowed to stand.

The first ground assigned is fraud and deceit in the obtaining of the judgment, but no fact is alleged as constituting the fraud, and nowhere in the proof offered under the motion is any fraud or deceit disclosed in support of the allegation.

The second ground is that the judgment was obtained as the result of false testimony and fraudulent misrepresentations made by the plaintiff in her testimony. This allegation appears to be based on the language of the plaintiff, that she did not know whether she had a husband living, that she had never seen him since they were divorced. In this she is to some extent corroborated by her husband, who testified that his first visit to Salisbury after the divorce was to attend the funeral of his daughter, which took place after the trial of the case. This cause assigned in the motion is not borne out by the proof.

The third ground was the legal question of the relative rights of the father and mother to maintain the action, and alleges as a fact that the father exercised control over and contributed to the support of his daughter from the time of the divorce until the time of her seduction. Both of these have already been considered as fully as seems necessary in discussing the main branch of the case.

The fourth cause assigned is that John Topfer, the father, had instituted a suit in Wicomico County on the same cause of action. But it is no ground for striking down a judgment which has been validly entered, that some other person has brought a suit, which can not be maintained upon the evidence adduced in this case, or in support of the motion upon the same claim.

And lastly the defendant avers that he has a good and meritorious defense to the action, but of what nature is not disclosed, either in the motion or evidence. If he had such defense he had ample opportunity to present it, but made no attempt to do so. He does not claim to have been taken by surprise, and he made no offer to contradict a single material fact adduced by the plaintiff in support of her case. It is clear that nothing was presented which would have justified the Court in striking out the judgment.

Both appeals will accordingly be affirmed.

*Judgment and order appealed from affirmed,
appellant to pay costs.*

Md.]

Syllabus.

WALTER W. RIGGINS

vs.

STATE OF MARYLAND.

Criminal law: carnal knowledge of female; evidence; conversation with State's Attorney; when not privileged. Opinion of State's Attorney as to guilt; when admissible.

Upon a criminal prosecution for carnally knowing a female under the age of 16, on cross-examination of the prosecuting witness, she was asked: First, "What did you tell the State's Attorney?" second, "Tell us your conversation with the State's Attorney?" Objections to the questions were sustained. *Held*, that by these questions she was expected to state all she told the State's Attorney, without regard to relevancy, and that the ruling was correct.

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She was further asked whether the State's Attorney did not say to her father, that there was no ground to have arrested her or the accused; objection to the question having been sustained, it was *held*, on appeal, that the ruling was correct.

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But a question as to whether she had not told the State's Attorney that she never had had intercourse with the accused, was proper, and should have been allowed to be asked and answered.

p. 168

While statements made privately to the State's Attorney by a prosecuting witness are privileged, in the sense that he can not be examined thereon, so as to contradict her, yet sometimes such a witness may be examined as to what the statements were.

pp. 172-173

It is improper for a prosecuting officer to assert his personal belief or personal conviction as to the guilt of the accused, if that belief or conviction is predicated upon anything other than the evidence in the case.

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But if such opinion is based upon testimony which, while not in the Record, was yet in evidence in the trial below, it presents no ground for reversal.

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Decided January 26th, 1915.

Appeal from the Criminal Court of Baltimore City.
(ELLIOTT, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UNER and CONSTABLE, JJ.

Wm. Purnell Hall and *George J. Kessler*, for the appellant.

Edgar Allan Poe, Attorney-General, (with whom were *Wm. F. Broening*, State's Attorney for Baltimore City, and *Horton S. Smith*, Assistant State's Attorney, on the brief), for the appellee.

PATTISON, J., delivered the opinion of the Court.

The appellant was convicted in the Criminal Court of Baltimore City of carnally knowing one Ella Weitzel, a female, not his wife, who, at the time of the alleged offence, was alleged to have been between the age of fourteen and sixteen years.

Md.]

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During the progress of the trial five exceptions were taken to the rulings of the Court upon the evidence. The prosecuting witness, Ella Weitzel, testified upon examination-in-chief, that the first time she had sexual intercourse with the appellant was in May, 1913, after she had left the hospital in April of that year, and this she says was the first time she ever had sexual intercourse with any one. She further testified that the defendant had such intercourse with her on a number of occasions thereafter, before her arrest in the latter part of October, 1913. When arrested she with her father, went to the office of the State's Attorney and, as she states in her examination-in-chief, "they asked me questions and all and I would not tell them anything." When upon cross-examination she was asked: "Didn't you go to the State's Attorney's office?" Answer: "Yes, sir, the day they got me." She was then asked the five following questions, to which objections were interposed, and the objections being sustained, and exception was noted to each of them:

1st:—What did you tell the State's Attorney?

2nd:—Did the State's Attorney ask you if you had had intercourse with Riggins prior to coming to his office?

3rd:—Tell us your conversation with the State's Attorney?

4th:—Didn't you tell the State's Attorney that you never had intercourse with Walter Riggins?

5th:—Didn't the State's Attorney tell your father (who was at that time in the office of the State's Attorney) that there was absolutely no ground upon which to have you arrested, or Mr. Riggins?

The occasion she speaks of when at the State's Attorney's office was in October, after she had been arrested, and after the occasions upon which she testified the defendant had sexual intercourse with her. The Court's rulings on the first and third questions were undoubtedly correct. In answer to the first of these questions she was at liberty, in fact she was expected, to state all that she told the State's Attorney,

and in answer to the third question she was to give the entire conversation between them, without regard to its relevancy; and we find no error in the ruling of the Court upon the second question. The Court's ruling, in not permitting the witness to answer the fifth question was also correct, for had the State's Attorney said to the father that there was no ground upon which either the witness or defendant could have been arrested this should not have gone to the jury. But as to the fourth question, we think the witness should have been permitted to answer it. If at the time mentioned the witness told the State's Attorney that the defendant had never had sexual intercourse with her, such statement is contradictory of her testimony given at the trial, and it must have been largely upon her testimony that the jury found its verdict, therefore, such statement if made, was, we think, admissible and should have gone to the jury.

It is contended, however, by the State, that the statement made by her as a witness to the State's Attorney, was a confidential communication and is privileged.

In support of its contention, the State has referred us to 40 Cyc. 2369, in which it is stated: "A confidential communication to a prosecuting attorney of a State, County or District, by a prosecuting witness is privileged." The author in a note thereto cites a number of cases in support of this statement: *State v. Houseworth*, 91 Iowa, 740; *Gabriel v. McMullin*, 127 Iowa, 426; *State v. Phelps*, Kirby (Conn.), 282; *Michael v. Matson*, 81 Kan. 360; *Oliver v. Pate*, 43 Ind. 132; *Vogel v. Gruaz*, 110 U. S. 311; *State v. Brown* (Del.), 36 Atl. Rep. 463. In addition to the above cases the State has cited *Bowers v. State*, 29 Ohio St. 543, and *Worthington v. Scribner*, 109 Mass. 488.

The cases of *Worthington v. Scribner*, *Gabriel v. McMullin*, and *Vogel v. Gruaz* were suits for slander, while the cases of *Michael v. Matson* and *Oliver v. Pate* were suits for malicious prosecution. In each of these cases the communication forming the basis of the civil suit was made to the prosecuting

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attorney, as such, in a proceeding criminal prosecution or investigation, and in all of such cases the Court refused to permit such prosecuting attorney to go upon the stand and disclose the communication so made to him.

In the case of *Bowers v. State*, the defendant was on trial upon an indictment for seduction under a statute of the State. The prosecuting witness having been examined by the State as a witness, and having denied, on her cross-examination, that she had ever admitted that the defendant's intercourse with her was had without any promise of marriage, the defendant in an attempt to prove such admission offered in evidence the admission of the prosecutrix made in consultation with her attorney in a bastardy proceedings instituted by her against the defendant. The Court there held that the case came clearly within the rule in regard to privileged communications between attorney and client and refused the admission of such evidence.

In the case of *State v. Houseworth*, the Court was construing a statute. The Court in the case of *State v. Phelps* would not permit the prosecuting attorney to put in evidence the disclosures made to him as such prosecuting attorney to the prejudice of the party making them. In disposing of the question the Court said "Disclosures under such circumstances to the attorney ought to be considered as confidential and it would tend to defeat the benefit the public may derive from them, should they be made use of to the prejudice of those from whom they come."

In the case of *State v. Brown* upon which the State greatly relies the defendant was on trial for murder. Thomas Oakes, the prosecuting witness, was permitted to testify as to what he had stated to the Attorney General when the latter was engaged with said witness in preparing the case for prosecution. To contradict the witness the private stenographer of the Attorney General, who was present at the time when the said statement of the witness was made was placed upon the stand, but the Court would not permit him to testify as to

said statement, holding that such communications were secrets of the State or matters the disclosure of which would be prejudicial to the public interest, but in the latter case of *State v. Rash*, 78 Atl. 405, it was held by the same Court that where a statement has been made by a witness to a prosecuting attorney bearing on the guilt of a person under investigation for bribery and where on the trial of a person for bribery the witness denied making such statement and has been indicted for perjury on such denial, the statement to the prosecuting attorney is not privileged and may be admitted in evidence against the witness under an indictment for perjury. The effect of this decision is that statements made to the prosecuting attorney are not under all circumstances to be regarded as privileged communications.

In other jurisdictions, in cases of malicious prosecutions and false arrests, the prosecuting attorney has been permitted, under objection, to state in evidence what had been communicated to him by the defendant, as prosecuting witness, in the investigation or prosecution of a preceding criminal charge, where such communication formed the basis of the civil suit. *Granger v. Warrington*, 8 Ill. 299; *Cole v. Andrews*, 74 Minn. 93; *Cobb v. Simon*, 119 Wis. 597; *Myseberg v. Engelke*, 18 Mo. App. 346.

A case similar in many respects to the one now before us is the case of *People v. Davis*, 52 Mich. 569. In that case the defendant was charged with having committed adultery with the wife of one, Thomas O'Rourke, the prosecuting witness. The prosecutor gave his evidence in the case at length, and when the defense entered upon their proofs Mr. Lowell, who was prosecuting attorney of the county when the prosecution was begun, was called to the stand and was asked, with a view to impeaching the prosecutor, whether in the statement O'Rourke made to him he did not say that on the occasion when he saw his wife and respondent together on April 30th, 1882, he saw nothing wrong between them. Objection was made to this question by both Mr. Lowell and the present prosecuting attorney, on the ground that communications

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made by the prosecutor to the prosecuting attorney were privileged; and the Court sustained the objection. The Court in that case, speaking through CHIEF JUDGE COOLEY, said: "It does not appear to have been claimed that Mr. O'Rourke had any privilege in the case, nor could it be; for he was not as to this prosecution the client of the prosecuting attorney, nor was that officer in any sense his counsel. He was, on the other hand, a sworn minister of justice, whose duty it was, while endeavoring to bring the guilty to punishment, to take care that the innocent should be protected. *Wellar v. People*, 30 Mich. 17, 24; *Meister v. People*, 31 Mich. 99. Communications made to him for the purpose of invoking official action are supposed to be made for the purposes of public justice, and the party making them can assume no control as to the use that shall be made of them subsequently.

"If, then, there is any privilege in the case, it must be the privilege of the State in whose interest O'Rourke assumed to act when making his communication to the prosecuting officer. And we are not called upon in this case to consider whether there may not be cases in which the prosecuting attorney would be excused, in the interest of the State, from disclosing what had been told to him with a view to the commencement of criminal proceedings. There would be strong reasons in many cases why the counsel of the State should be inviolably kept; and nothing we shall say in this case will be intended to lay down a rule except for the very case at bar and others standing upon the same facts.

"In this case the prosecutor testified that on a particular day and at a place specified he witnessed the commission of the crime charged. The defense then offered to show that in laying the case before the prosecuting officer the prosecutor stated that on the day and at the place specified he witnessed nothing wrong between the parties. If he did so state at that time, when he was laying before the public authorities the very case they were to prosecute, and if he now swears to a case altogether different, it may well be argued that he is unworthy of belief; and the State has no interest in inter-

posing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons. But surely the State has no such interest; its interest is that accused parties shall be acquitted unless upon all the facts they are seen to be guilty; and if there shall be in the possession of any of its officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it. There was, therefore, no privilege to preclude the giving of the testimony for which the defense called."

It will thus be seen that the authorities are conflicting as to the character of such communications.

The case before us differs from the cases we have mentioned in that the evidence here offered is that of the prosecuting witness and not the prosecuting attorney as in those cases.

The question here presented is whether the prosecuting witness should have been required to answer the question and not whether the State's Attorney may be called to the stand to contradict her. If she had been permitted to answer the question and had answered it in the affirmative the State's Attorney would not have been called upon to disclose the statement made by her to him.

There may be, and doubtless are, cases where the administration of justice would be greatly impaired or interfered with if witnesses therein were required to testify as to information imparted by them to the prosecuting attorney in the investigation or prosecution of such criminal charges. In all such cases the witness should not be required to disclose such information, but in this case we can not see how the answering of the question asked could in any way prejudice the rights of the witness or interfere with the proper administration of justice or could in any way be regarded as against public policy.

The witness had testified on behalf of the State that the defendant had sexual intercourse with her long prior to said conversation with the State's Attorney and had also testified

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upon cross-examination that in such conversation she "would not tell the State's Attorney anything" as to the offense charged against the defendant, when she was asked, "didn't you tell the State's Attorney that you never had intercourse with Walter Riggins?" This question as we have said should have been answered, for had she made such statement to the State's Attorney, this fact should have gone to the jury as affecting her credibility to the extent of the weight the jury may have given it under the facts and circumstances of the case. But as we will remand this case for new trial and as the witness, at such trial, may again be asked this question and may answer it in the negative, we will here state that in our opinion the State's Attorney may, if she denies making such statement, be called to the stand for the purpose of contradicting her. In so holding, however, we wish it understood that we are not laying down any general rule to be applied in all cases of this character, but what we here say applies only to this case or to cases of like facts and circumstances where there is no impairment of or interference with the fair and proper administration of justice by permitting such disclosures to be made.

The remaining exception is to the action of the Court in its refusal to instruct the jury to disregard an expression or statement of the State's Attorney made by him in his argument to the jury. It was disclosed by the evidence offered by the defendant that at the time the prosecuting witness was at the hospital in April, 1913, before the occasion upon which she said the defendant first had sexual intercourse with her, she had what is called a marital outlet.

The State's Attorney in his argument to the jury in referring to this evidence said: "I believe if she had a marital outlet before she went to the Johns Hopkins Hospital, Riggins was the cause of it, and this is the reason I believe Riggins was the cause." He at that time, showing to the jury a postal card written by the defendant to the prosecuting witness which had been put in evidence.

"It is of course improper for a prosecuting officer to assert his personal belief or personal conviction as to the guilt of the accused, if that belief or conviction is predicated upon anything other than the evidence in the case. But, upon the other hand, such prosecuting officer has the undisputable right to urge that the evidence convinces his mind of the accused's guilt. Indeed, it would be mere stultification if it were contended that the prosecuting attorney could argue to the jury that the evidence should convince their minds although it did not convince his. A prosecuting officer therefore has the right to state his views as to what the evidence shows."

In *People v. Weber*, 149 Cal. 325, the opinion expressed by the State's Attorney was based upon the contents of a postal card which is not in the record, it seems, but which was part of the evidence in the case, and, therefore, in our opinion the Court committed no error in its ruling upon this exception.

The judgment, however, will be reversed for the error hereinbefore stated and a new trial awarded.

Judgment reversed and new trial awarded.

Md.]

Syllabus.

JULIA E. BOYD, ADMINISTRATRIX OF ASBURY MCKEN-
DREE BOYD, DECEASED,

vs.

HENRY SHIRK.

Equity: pleading; allegations of bill; must be clear and accurate as to essential allegations; general charge usually sufficient; fraud; how to be charged. Demurrers: conclusions of law not admitted. Executors and administrators: duty of—; laches.

Every material fact, which it is necessary for a complainant to prove to establish his right to the relief he asks, must be alleged in the bill with reasonable accuracy and clearness.

p. 179

A general charge of the matters of fact, however, is usually all that is required, and it is not necessary to state minutely all the circumstances which go to prove the general charge.

p. 179

But where the complainant seeks relief on the ground of fraud, he must do more than make the general charge; he must state the facts which constitute the fraud.

p. 179

A demurrer does not admit conclusions of law drawn by a plaintiff from facts stated in the bill.

p. 181

The law imposes upon all persons having the settlement of the estates of decedents the duty of protecting the estates.

p. 182

When a person with such a duty comes into court four and a half years after his appointment, and declares he could not by due diligence have discovered the alleged fraud, when, from his own admissions, the very thing happened which should have put him upon notice, he is guilty of laches, and to grant him relief would be aiding too far those who are dilatory in the performance of their official duties.

p. 182

Decided January 26th, 1915.

Appeal for the Circuit Court of Baltimore City. (DUFFY, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J. BEISCOE, BURKE, THOMAS, PATTISON, UNER, STOCKBRIDGE and CONSTABLE, JJ.

Chas. H. Medders, for the appellant.

J. Purdon Wright and *Harold Tschudi* (with whom was *Armstrong Thomas* on the brief), for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

This appeal brings up for determination the correctness of the rulings of the lower Court, on a demurrer to an amended bill. Demurrers to the original, and two amended bills, having been sustained, the demurrer to the third amended bill was sustained and the bill dismissed.

The bill was filed March 19th, 1913, by the appellant, as the administratrix of the personal estate of her father, who was resident of Virginia at the time of his death in June, 1908. Letters of administration were issued to the appellant in November, 1908, by the Orphans' Court of Baltimore City for the purpose of administering on the personal estate of the decedent located in Baltimore.

Md.]

Opinion of the Court.

One of the grounds urged for sustaining the demurrer, makes it necessary that we set out, quite fully, the allegations of the amended bill.

The bill alleges that Asbury McKendree Boyd was, at the time of his death, the owner of several leasehold properties in Baltimore City, and describes them by location, as to streets and numbers; that Henry Shirk, the defendant below and appellee here, was employed in March, 1894, by the said Boyd as his attorney and agent, to collect the rents and look after the properties generally; that the said Boyd was at the time a resident of Virginia, and "suffering from a progressive disease, which affected his mind and body, and caused his death, all of which was known to the defendant"; that the said Shirk "while acting as attorney and agent, as aforesaid, did at various times borrow, and cause to be borrowed, large sums of money on the properties herein mentioned, by way of mortgages, notes, assignments and otherwise from various persons and Building Associations, which money the defendant fraudulently appropriated to his own use; that the defendant neglected to pay taxes and other expenses due on said properties, or to repair the same, although he led your oratrix's decedent to believe he had done so." It is further alleged that the said Shirk, while attorney and agent, "by various fraudulent schemes did obtain title to several of said properties belonging to said Boyd, and Boyd's estate, by misrepresenting the debts and expenses on said properties; and having a fraudulent claim of \$1,813.88 passed by the Court." And also alleged that the defendant, while acting as attorney and agent, did collect large sums of money by way of rents, mortgages, sales and otherwise from said properties, the exact amounts of which are unknown to your oratrix, and did appropriate the same to his own use and benefit, and has never accounted to the said Boyd or your oratrix" for the same "which should have been credited to the said Boyd and said Boyd's estate instead of being charged against them, although an accounting was and has been demanded from said defendant by said Boyd and your ora-

trix, which said defendant has and now refuses to give." It is further alleged that Shirk had full charge of all the properties and collected all rents from the date of his first employment in March, 1894, until the present time, with the exception of two of the properties, naming them, which were taken out of his control in August, 1912. It is further alleged, again using the language of the bill, "that the defendant withheld the true status of the properties mentioned herein from your oratrix's decedent and from your oratrix, and that the defendant was not suspected of any wrong doing alleged herein until about August, 1912, when she had all matters connected with said properties investigated by another attorney, and then, for the first time, the fraud herein alleged was discovered." There is a further allegation that the fraudulent acts, misrepresentations and misappropriations could not have been discovered, with due diligence, within three years before the filing of the bill. The bill concludes by alleging that the estate cannot be closed until the moneys, had and received by the defendant as attorney and agent, have been accounted for, and which facts are peculiarly within his knowledge.

The relief prayed is, that the defendant discover and set forth in detail all sums of moneys received by him by way of rents, profits, sales, mortgages, notes or otherwise from said properties which were managed by him as attorney and agent; that he account with the complainant for her interest, as administratrix, in the rents and profits of the properties from the date of employment to the present; that he may be decreed to pay over to her all sums due by him as such attorney and agent; that the defendant shall be required to account for rents and profits from the properties now in his name, and which formerly belonged to the estate of said Boyd; that he may be decreed to hold the properties, now in his name formerly belonging to the said estate, as a resulting trust; that he account for the net profits therefrom since his alleged ownership, and for general relief.

Md.]

Opinion of the Court.

The grounds of demurrer were stated to be: (1) That the bill does not state such a cause of action as entitled appellant to the relief of a Court of Equity; (2) that the allegations are too general and indefinite to require an answer; (3) that the allegations of fraud are too general; (4) the Statute of Limitations; (5) no sufficient allegation of facts to avoid the bar of the statute; (6) no sufficient allegations excusing or explaining the delay in ascertaining the alleged rights, and (7) multifariousness.

No rule of equity pleading is better settled than that which declares, that every material fact, which it is necessary for a complainant to prove to establish his right to the relief he asks, must be alleged with reasonable accuracy and clearness. If the case is set out in a vague and indefinite manner a demurrer will lie. A general charge of the matter of fact, however, as a general rule is all that is required and it is not necessary to state minutely all the circumstances which go to prove the general charge, for these circumstances are more properly matters of evidence. *Story's Eq. Pl.*, sec. 28; *Miller's Eq. Pro.*, sec. 92. But where a complainant seeks relief on the ground of fraud he must do more than make a general charge of fraud; he must state the facts which constitute the fraud, so that the person against whom relief is sought may have a full opportunity, not only to deny or explain the facts charged, but to disprove them. He has a right to know, in advance of being required to file an answer, just what he is compelled to meet. As is stated by Mr. Justice Story in his work on *Equity Pleading*, before referred to, at section 251: "Where a bill seeks a general account upon a charge of fraud, it is not sufficient to make such charge in general terms; but it should point out, and state particular acts of fraud." To this effect are all the decisions in Maryland, and so numerous are they that we do not deem it necessary to cite any more than one of the latest, *Reeder v. Lanan*, 111 Md. 372.

When these principles are applied to the bill in this case it is readily seen how far short of the requirement of good

pleading these allegations fall. The charges of fraud are made not only in the most general terms, but are so vague and indefinite as to give not the slightest indication to the defendant what facts and circumstances he is to deny or disprove, other than that he has defrauded the estate. Take for instance the first charge of fraud in the bill. It is alleged that he, while acting as attorney and agent, did at various times borrow and cause to be borrowed on the properties, large sums of money from various persons and building associations, by mortgages, notes, assignments, etc., and appropriated the money therefrom to his own use. Could any charge be more indefinite than this? If this defendant is to intelligently answer this charge, he is entitled to know each sum that was borrowed and misappropriated, when it was borrowed and from whom borrowed, how each mortgage, note, assignment, etc., was made, and to whom made, and possibly where each mortgage was recorded. It must be remembered that the defendant had had general charge of the properties for a period of nearly twenty years; and it certainly cannot be claimed that, on a general charge such as this, he can be called upon to explain each and every financial transaction connected with the properties. The allegation is made that from an investigation made for the complainant by another attorney, the frauds were discovered. If such frauds had been discovered it was in the power, and the duty, of the complainant to set them out in her bill. Why she has not done so after so many demurrers had been sustained on this ground, is conceivable only on the theory that what has been discovered for her consists of suspicious rather than facts. It is at all times dangerous to relax the settled rules of law to meet the necessities of special cases, but there is not the slightest excuse, and we might add temptation, to do so, when one insists he has certain facts within his knowledge and persistently refuses to disclose them.

What we have said as to the paragraph mentioned applies equally to every other paragraph where fraud is charged.

Md.]

Opinion of the Court.

Instead of charging that by various fraudulent schemes title was obtained to several of the properties, the facts themselves should have been set out, and, further, the properties so obtained should have been designated. The allegation in the next paragraph is in almost the identical language in which fraud was charged in the case of *Reeder v. Lanahan*, *supra*, and this Court in disposing of that allegation, said: "The allegation of fraudulent appropriation of the assets of the firm is too loose and indefinite to be noticed." We think this language is applicable not only to this paragraph, but is equally so to every paragraph here under discussion. We are, therefore, of the opinion that the lower Court was correct in sustaining the demurrer on the ground of uncertainty and indefiniteness.

In dismissing the bill we are also of the opinion the ruling was correct. From the allegations it appears that Mr. Boyd died on the 24th day of June, 1908, and that letters of administration were granted to the complainant on the 23rd day of November, in the same year, by the Orphans' Court of Baltimore City, for the purpose of settling his estate situated in Baltimore, he having been a resident of the State of Virginia. The original bill was not filed until the 19th day of March, 1913, almost four and one-half years after the complainant had assumed the duties and obligations of an administrator. She alleges the defendant was not suspected of wrong doing until August, 1912, and that the fraudulent acts could not have been discovered by due diligence. A demurrer does not admit conclusions of law drawn by a plaintiff from facts stated in the bill. *Miller's Eq.*, sec. 133. That the alleged frauds could not have been discovered by due diligence is a conclusion of law. In our opinion, from the facts stated, we think the complainant was guilty of laches in not prosecuting her alleged cause of action until four and a half years after she qualified as administratrix. She had been appointed for the especial purpose of settling the personal estate of the decedent and apparently did nothing toward that end, other

than demand an accounting from her decedent's agent. But it might be said that she had no reason to suspect the trusted attorney of her deceased father of wrong doing, and that the failure to get an accounting from him was nothing more than a delay that is more or less usual between attorneys and clients. But the force of that argument is lost, when it is recalled that the decedent had in his lifetime demanded an accounting and had been refused. The law imposes upon all persons having the settlement of the estates of decedents the duty of protecting those estates. The process of the Courts is open to them for that end. And for a person charged with that duty to come before a Court four and a half years after appointment and declare he could not have discovered by due diligence an alleged fraud, when from his own admissions the very thing had happened, which should have put him on notice, would be aiding too far those who are dilatory in the performance of their official duties.

The decree of the lower Court will therefore be affirmed.

Decree affirmed, with costs to the appellee.

Md.]

Syllabus.

SADIE C. BISHOP

vs.

F. BERNARD FRANTZ.

Malicious prosecution: want of probable cause; technical malice; burden of proof; advice of counsel; when no defense.

As used in relation to the question of malicious prosecution, the phrase "probable cause" means such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the party accused to be guilty. p. 190

The term "malice" in this connection does not mean spite or hatred, but merely "*malus animus*," or improper and indirect motives. p. 196

In such cases the plaintiff must prove that the prosecution was both malicious and without probable cause, to entitle a recovery; but the existence of malice, is a question of fact for the jury, under all the facts of the case. p. 190

The jury should be instructed hypothetically as to what constitutes probable cause or want of it, leaving to them to find the facts embraced in the hypothesis. p. 191

If a prosecution is instituted upon weak and unsubstantial grounds, for the purpose of annoyance, or of frightening and coercing the party prosecuted into a settlement of a demand, the surrender of goods, or the accomplishment of any other object than the vindication of public justice, the party who puts the criminal law in motion, under such circumstances, lays himself open to the charge of being actuated by malice. p. 196

Decided January 26th, 1915.

Prayers.

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Appeal from the Circuit Court for Washington County.
(KEEDY and HENDERSON, JJ.)

The following are the prayers of the respective parties, and the action of the trial Court upon the same:

Pltff.'s 1st Prayer—The plaintiff prays the Court to instruct the jury that if they find from the evidence that on or about the 4th day of November, A. D. 1913, the plaintiff was arrested on a warrant and brought to the office of J. H. Ferguson, a justice of the peace, and that he was thereafter released on bail, after having prayed a jury trial, if the jury shall so find, and was held to await the action of the next term of the Circuit Court for Washington County, and further find that Mr. Spessard, the attorney for the said Sadie C. Bishop and her legal adviser in connection with her action in procuring the warrant for the arrest of the plaintiff, offered in evidence, with authority from the said Sadie C. Bishop, or acting at her instance informed the State's Attorney for Washington County, that she did not desire any further prosecution of said case, and that by reason thereof, if the jury so find, the said State's Attorney did not prosecute said case in the Circuit Court for Washington County (and that by the action of the State's Attorney for Washington, the prosecution of the plaintiff on said warrant was at an end) if the jury shall so find, and shall further find that said warrant was issued at the instance of and on the oath of the defendant and that said defendant procured the arrest and prosecution of the plaintiff before the said justice of the peace under such circumstances as would not have induced a reasonable and cautious person to have undertaken a prosecution from public motives, then there was no probable cause for said prosecution, and the jury may infer in the absence of sufficient proof to satisfy them to the contrary, that said prosecution was malicious in law, and their verdict may be for the plaintiff, unless the jury find the facts set forth in the defendant's third or fourth prayer. And if the jury find the facts set forth in either said third or fourth prayer of the

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Prayers.

defendant, then the plaintiff is not entitled to recover and their verdict must be for the defendant even though the jury may find the facts first above set forth. (*Granted as modified.*)

Pltff.'s 2nd Prayer—The plaintiff prays the Court to instruct the jury that if they shall find a verdict for the plaintiff, they are at liberty to take into consideration all the circumstances of the case and award such damages as will not only compensate the plaintiff for the wrong and indignity he has sustained in consequence of the defendant's wrongful acts, but may also award exemplary or punitive damages as a punishment to the defendant for such wrongful acts. (*Granted.*)

Deft.'s 1st Prayer—The defendant prays the Court to instruct the jury that under the pleadings in this cause there is no evidence in this cause legally sufficient to entitle the plaintiff to recover. (*Rejected.*)

Deft.'s 2nd Prayer—The defendant prays the Court to instruct the jury that there is no evidence in this cause legally sufficient to entitle the plaintiff to recover. (*Rejected.*)

Deft.'s 3rd Prayer—The defendant prays the Court to instruct the jury that if they find from the evidence in this cause that the plaintiff and defendant entered into the agreement offered in evidence and that after the plaintiff entered upon the performance of his duties under said agreement, if the jury so find, the defendant notified the plaintiff either orally or in writing or both that she discharged him from her employment and further find that thereafter the plaintiff against the order and notice of the defendant, if the jury so find, continued to remain on the property testified to and to go upon the fields of defendant's principal mentioned in said agreement and further find that the defendant upon consultation with her counsel disclosed unto him all the facts and

circumstances surrounding the employment and hiring of plaintiff and their relations to each other and concealed nothing and that said attorney advised the issuing of the warrant offered in evidence and that defendant believed said advice to be sound, and in good faith acted thereupon without malice, then there was probable cause for the issuing of said warrant and the arrest of the plaintiff, if the jury so find, and their verdict must be for the defendant. (*Granted.*)

Deft.'s 4th Prayer—The defendant prays the Court to instruct the jury that if they shall find that the defendant, in reference to the institution and prosecution of the charge complained of, acted *bona fide* and without malice, under the professional advice and direction of her counsel, Mr. Spessard, that she then and there stated to her counsel all the material facts that she knew at the time were capable of proof, or which by the exercise of reasonable diligence she could have ascertained, and concealed nothing material, that she then believed said advice to be sound, then she is not liable, and the plaintiff cannot recover in this action, even though Mr. Spessard's advice may not have been sound, and although, but for such advice the defendant would have had no probable cause for her action. (*Granted.*)

Deft.'s 5th Prayer—The defendant prays the Court to instruct the jury that there is no evidence in this cause legally sufficient to establish malice and want of probable cause upon the part of the defendant against the plaintiff in the arrest and prosecution of the plaintiff as set forth in the declaration; and their verdict must be for the defendant. (*Rejected.*)

Deft.'s 6th Prayer—The defendant prays the Court to instruct the jury that there is no evidence in this case legally sufficient to entitle the plaintiff to recover. (*Rejected.*)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

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Opinion of the Court.

Harvey R. Spessard (with whom was *Wagaman and Wagaman* on the brief), for the appellant.

D. A. Wolfinger (with *Hartle* and *Wolfinger* on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This is an action for malicious prosecution brought on the 14th day of January, 1914, by the appellee, the plaintiff below against the appellant, the defendant, in the Circuit Court for Washington County.

The plaintiff recovered a verdict of \$1,000, but upon a remittitur, the verdict of the jury was reduced to the sum of five hundred dollars, and from a judgment in favor of the plaintiff for the last named amount, the defendant has appealed.

The questions to be considered by us are presented by a single exception and that is, to the ruling of the Court below in the course of the trial, on the prayers.

The plaintiff's first and second prayers were granted, with a modification by the Court of the first prayer.

The defendant's first, second, fifth and sixth prayers were refused. The third was granted, as modified by the Court, and the fourth was also granted.

The facts of the case, so far as they may be necessary for the purposes of this appeal, briefly stated, are these:

Dr. E. Tracey Bishop, owned a fruit farm near Smithsburg, in Washington County, and during the year, 1913, this farm was under the care and management of his daughter, the defendant below, and the appellant here, as agent.

On the 13th day of January, 1913, as agent for her father, she entered into a written contract with the appellee, whereby she agreed to employ and engage him "to cultivate and care for in a scientific and farm like manner" all the lands mentioned therein, "including the orchard and workable lands about the home place, on the Waynesboro road." In consideration of the services specified and required by the

contract she was to pay him the sum of \$500 for one year, in monthly payments of not less than fifteen dollars per month. The year's service was to begin with April, 1913, and end one year thereafter. The contract contains a provision that "each party agrees to give not less than two months' notice." She was to give him a house, garden and lot, the possession of which was to be surrendered to the owner at once upon expiration or cancellation of the agreement. There were certain restrictions, limitations and other requirements imposed by the contract which need not be set out in detail here.

On November 3rd, 1913, after repeated differences and contentions between the parties, and after seeking the advice of her attorney, the following notice was given the plaintiff by the defendant:

"I hereby notify you that I no longer desire your services and you shall consider yourself discharged from my employment, as I have heretofore notified you orally. And I further give you notice that you shall cease to go upon any of the fields of the farm where you are now living; and that you shall move your property and yourself from said farm and premises within ten days from this date."

On the 4th of November, 1913, the defendant swore out a warrant for his arrest for trespass under the Act of 1900, Chapter 66, and upon being arrested he was brought before J. H. Ferguson one of the Justices of the Peace of the State, in and for Washington County, where upon praying a jury trial, and giving bond, he was released for trial, before the Circuit Court of Washington County.

Subsequently, Mr. Harvey R. Spessard, attorney for the defendant requested the State's Attorney for Washington County not to prosecute the case, and it was either dismissed or abandoned.

Afterwards, on the 14th of January, 1914, this suit was instituted by the plaintiff against the defendant, to recover

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damages for the arrest and malicious prosecution of the appellee, under the warrant issued by the Justice of the Peace, as set out in the declaration filed in the case.

The rules of law, upon cases of this character, have been so clearly and carefully stated, in the recent decisions of this Court, wherein the former cases, upon the subject of malicious prosecutions have been fully reviewed and adopted, that it would answer no good purpose to prolong this opinion, by an extended review of them.

A citation of a few of the cases, will be found sufficient, for the conclusion, we have reached, on the record, now before us. *Moneyweight Scale Co. v. Mc'ormick*, 109 Md. 170; *Lasky v. Smith*, 115 Md. 374; *Mertens v. Mueller*, 119 Md. 534; *Brown v. Smith*, 119 Md. 249; *Chapman v. Nash*, 121 Md. 611; *Mertens v. Mueller*, 122 Md. 317.

The declaration is in the usual approved form in such cases, and charges in substance that the warrant and bail bond was sent to the clerk of the Circuit Court by the Justice of the Peace, to await trial at the next term of that Court, and that the case was entered upon the criminal recognizance docket of the Court but that the State's Attorney refused to prosecute it, and the suit was abandoned. It then avers, that the swearing out of the warrant and the prosecution of the plaintiff by the defendant was falsely and maliciously done without any reasonable or probable cause and there was no reasonable or probable cause for the warrant and arrest, and that the charge was made through motives of malice, and that as a result the plaintiff was greatly wronged and injured.

It is admitted and not disputed by the appellant, that there was a criminal prosecution as set out in the declaration, and that it terminated in favor of the accused before the institution of this suit, but it is earnestly insisted upon the part of the defendant, that there was no evidence legally sufficient to establish the want of probable cause or to show malice, in swearing out the warrant, under the facts of the case.

In *Boyd v. Cross*, 35 Md. 196, it is said, "to entitle the plaintiff to recover for malicious prosecution, it was incum-

bent upon him to prove affirmatively, that he had been prosecuted, or that a prosecution had been instigated, by the defendants, or one of them; that such prosecution had terminated in his discharge or exoneration from the accusation against him; and that such prosecution was both malicious and without probable cause on the part of the defendants. All of these propositions must concur, and be established by the plaintiff, to entitle him to maintain his action. If the evidence adduced be legally insufficient to be submitted to the jury to prove each and all of these elements of the plaintiff's case, his action could well be pronounced groundless, and the defendant not be called on for his defense.

What will amount to such combination of malice and want of probable cause, as will entitle a party to maintain an action, says CHIEF JUSTICE TINDALL (*Williams v. Taylor*, 6 Bing. 183), is so much a matter of fact in each individual case, as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused. Perhaps the most accurate definition of probable cause is that given by JUDGE WASHINGTON, in *Munns v. Dupont*, 3 Wash. C. C. Rep. 31, as being "such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in believing the party accused to be guilty."

While it is well settled in cases of this kind that the plaintiff must prove that the prosecution was both malicious and without probable cause to entitle a recovery, the existence of malice is a question of fact for the jury, under the circumstances of each case. *Boyd v. Cross*, 35 Md. 194.

It is also well established that the want of probable cause is a mixed question of law and fact.

In *Boyd v. Cross*, 35 Md. 196, it is said and re-affirmed in subsequent cases, as to the existence of the facts relied on to constitute the want of probable cause, that is a question for the jury; but what will amount to the want of probable cause in any case, is a question of law, for the Court. The

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jury, in our practice, are always instructed hypothetically as to what constitutes probable cause or want of it, leaving to them to find the facts embraced in the hypothesis. *Cooper v. Utterbach*, 37 Md. 282; *Torsch v. Dell*, 88 Md. 459; *Chapman v. Nash*, 121 Md. 611.

We cannot hold then, upon the facts and circumstances of this case as disclosed by the record, that there was no legally sufficient evidence to be submitted to a jury to establish malice and want of probable cause upon the part of the defendant, in the arrest and prosecution of the plaintiff, as set forth in the declaration.

It would be extending the doctrine established by the cases relied upon by the appellant, much further than it ever was intended by those cases if under the facts of this case, we should so hold.

A brief review of the evidence, will disclose the following state of facts, presented in the course of the trial:

The plaintiff testified that he entered upon the employment, in pursuance of the contract, on the 7th of March, 1913, and discharged his duties in a workmanlike manner. He identified the written notice offered in evidence, as the one that was served upon him, and testified further as follows: "She took all the feed away, turned my hogs out down the lane, drove them down the lane and took the team away to prevent me from doing the work. When she moved the hay from the mow she threw some chicken coops down on the barn floor and broke a lamp on my surrey. She broke two locks for me, one was on the feed bin (the locks were produced at the trial). She took a barrel of my corn out of the bin. She took my pruning shears. After the expiration of ten days from the service of written notice, defendant came to the farm with a team and a man, who we afterwards learned was the defendant's brother-in-law, and wanted us to move out. My wife became frightened, and they then went away, the man came to the house, and when he saw that my wife was frightened, he apologized and went away. Defendant did not come to the house. I was arrested on November

4th, election day. I was taken down through the town, past the polls to the magistrate's office by the constable. There was a great many people on the street that day. I didn't go back to husk corn that day. Several days later I did. I took a two years' course in the Maryland Agricultural College."

He further testified on cross-examination: "She told me to go and look at the peaches, and if they were fit we should pick them. I was there to use my own judgment and hers too. The trouble started when I wanted the balance of my money. She owed me some wages. She told me to quit before the written notice was given. She came to the field where I was husking corn and stood on the corn pile so I could not throw the corn on it. I was performing my contract."

Talbott Smith, a witness, testified, I helped to haul the hay from the barn and saw Miss Bishop throw the coops from the hay mow. Do not know if they hit the surrey or not.

Mrs. Frantz, the wife of the plaintiff testified I saw Miss Bishop turn our hogs out and drive them down the lane along the sweet corn patch. This was while the plaintiff was being taken down to the squire's office, under arrest.

Arthur L. Towson, a farmer and fruit grower and who lived on the adjoining farm testified that he was over there through the peach orchard once or twice and the plaintiff did his work well, that he observed how he did his work.

Claude M. Ferguson, the constable who made the arrest of the plaintiff, testified, "I saw defendant and talked to her before the arrest. She spoke about the plaintiff feeding too many hogs. In the squire's office I heard her say that she broke some locks and that she let his hogs out. The plaintiff was in the field husking corn when I arrested him."

These were all of the witnesses examined upon the part of the plaintiff, except the Justice of the Peace and the State's Attorney. The former testified in substance that the defendant swore out the warrant for the arrest of the plaintiff, that he was arrested, brought to his office, and the defendant never

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inquired about the case after the arrest, that he never sent for Miss Bishop and the warrant was filled out by her attorney.

The latter testified, that Mr. Spessard, the attorney for Miss Bishop came to him during the November term of Court, and asked him not to prosecute the case, and he told him there was nothing to proceed on. He testified in rebuttal: Mr. Spessard did come to see me on election day and asked me to advise Mr. Frantz to quit work, and I told him I would not so advise him. Mr. Spessard further said you know how those people are, if he don't quit they will have him arrested. I didn't say "that is just what we want you to do," but said "go do your worst, I am sick and tired of the whole darn business."

Miss Bishop, the defendant, testified, that she gave the plaintiff a verbal notice of discharge in October, 1913, and the written notice two weeks afterwards, that she discharged him because he was not inclined to do the work, and she could not use him any longer, that he would not do the spraying and she had trouble with him about the performance of other work, that he was indifferent to his duties. He would husk corn when I did not want him to do it and I would have to send the children up to haul it in. I told him the reason I didn't want him any longer. I talked to Mr. Spessard and advised with him every day until the warrant was issued. Before swearing out the warrant I advised with Mr. Spessard, told him the corn was being husked, hogs were in pens, was afraid of big hog. On Mr. Spessard's advice I swore out this warrant. After warrant was issued I did nothing toward prosecuting the case. I had no actual malice toward Mr. Frantz. I relied on Mr. Spessard, I believed his advice to be sound. Q. Why did you swear out the warrant? A. I issued the warrant because I wanted him to stop husking corn. I understood it would make him stop husking corn. I depended on Mr. Spessard. I took the team away to keep him from hauling over wet fields. His pruning shears were like mine, and I took away every one so he could not trim any more. I went a round-about way so I would

not have to go across the alfalfa field. I took corn away, I had left some corn there. I thought the corn was mine. I didn't know it belonged to Mr. Frantz until it was moved. I did break the lock on the bin. It was my bin and it was the first time I had seen a lock on it. I broke the lock with a hammer. I did drive the hogs away. I wanted him to understand I didn't want his services any longer. I sent word to Mr. Frantz. I went there afterwards with my brother-in-law. I did not consult my father about the warrant, but did about plaintiff's conduct.

She testified upon cross-examination as follows: Q. Did you know that he would be arrested? A. Yes, I knew he would be arrested. Q. Did you want him arrested? A. Yes. Q. Did you know the contents of that paper you swore to? A. I did not know what was all in that paper. Q. Would you have charged Frantz with a crime to make him quit husking corn? A. I would not. Q. Why did you want him to quit husking corn? A. The ground was wet and I had to damage the fields if I wanted the corn. Q. Would you have wanted Frantz sent to jail or the penitentiary? No, I wouldn't. I thought he would be fined a couple of dollars. I don't deny if I injured the surrey, if I did, I didn't know it. In the summer when I saw Mr. Spessard my grievance was the same as in November. I told him all these things, about the spraying, his failure to perform his work. Had to beg him to let me have my horses. Mr. Spessard had seen the contract. I was begging Mr. Spessard to help. Don't know if Mr. Spessard advised me to swear out a criminal warrant, thought it was just to help to get my corn. I did the best I could for myself. Had to grin and bear it. I had him arrested for husking corn.

Mr. Harvey R. Spessard, an attorney, of the Washington County Bar, testified, that he was the defendant's attorney at the time of the arrest, and before. The defendant came to me for advice when her troubles with the plaintiff first began. She told me about his conduct, and I told her if she could prove the statements she made she would be justified

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in discharging him. She came later and told me she had discharged him, but that he refused to quit work. She said he was husking corn and refused to quit. I had seen the agreement. I questioned her carefully to learn the facts and circumstances. She had been seeking my advice frequently and telling me all about the circumstances. So far as I have been able to learn she told me all the facts and circumstances. I then advised Miss Bishop to serve a written notice on plaintiff, and that if he still went upon the fields she could have him arrested for trespass. I prepared the notice and sent the constable to serve it. The next day Miss Bishop came and informed me that he was out in the field husking corn. I then advised her to swear out a warrant. She said she disliked to do that, and I told her I would see his attorney and ask him to advise him to quit. I went up to the polling place and saw Mr. Wolfinger, attorney for plaintiff. I asked him if he would advise Mr. Frantz to cease going upon the fields and quit work, and he said he would not. I told him that Miss Bishop didn't want to have Mr. Frantz arrested, but if he did not quit she would have to. Mr. Wolfinger then stated "that is just what we want you to do." I then returned to Miss Bishop and told her the plaintiff's attorney refused to advise him to quit, and I again advised her to swear out the warrant. I went to the magistrate's office and filled out the warrant. It is in my hand writing. I relied on the Act of 1900, Chapter 66. Outside of swearing out the warrant, Miss Bishop had nothing to do with the prosecution. I did not appear at the magistrate's office when he was brought there. He was going away before I knew that he had been there. Nothing more was done in the matter until I learned that plaintiff's attorney was making inquiry about the papers in the case being sent up. I then went to the State's attorney and asked him not to prosecute the case. Miss Bishop had said nothing to me about it that I can remember. She did not like the idea of prosecuting him, and as his attorney was advising him to go upon the fields, I could see no good in having him prosecuted, and I just assumed

that it would be satisfactory to her. I had no notice whatever from Miss Bishop to advise State's attorney not to prosecute the case.

Upon this state of facts, we think, the Court below, was entirely right, in refusing to withdraw the case from the jury, as requested by the defendant's first, second, fifth and sixth prayers.

The case on the facts, in our judgment, falls within the rules established by this Court, in the cases of *Cooper v. Utterbach*, 37 Md. 310, and *Torsch v. Dell*, 88 Md. 459, and was a case to be left to the determination of a jury, upon proper instructions by the Court.

In *Johns v. Marsh*, 52 Md. 332, JUDGE ALVEY, in delivering the opinion of the Court, said, as was accurately stated by Mr. JUSTICE PARKE, afterwards BARON PARKE, in *Mitchell v. Jenkins*, 5 B. & Ad. 594, "the term 'malice,' in this form of action, is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives." If, for example, a prosecution is initiated upon weak and unsubstantial ground for purposes of annoyance, or of frightening and coercing the party prosecuted into the settlement of a demand, the surrender of goods, or for the accomplishment of any other object, aside from the apparent object of the prosecution and the vindication of public justice, the party who puts the criminal law in motion under such circumstances lays himself open to the charge of being actuated by malice. Such motives are indirect and improper, and for the gratification of which the criminal law should not be made the instrument. *Add. on Torts*, pp. 594, 613; 2 *Greenl. Evi.*, sec. 453."

But it is urged upon the part of the appellant that the case should not only have been withdrawn from the consideration of the jury but there was error in the Court's modification of the defendant's third prayer, by the insertion of the words, "And in good faith acted thereupon without malice" and the jury was misled thereby to the injury of the defendant.

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The defendant's third prayer, after stating the facts therein, instructed the jury "and if they further find that the defendant upon consultation with her counsel disclosed unto him all the facts and circumstances surrounding the employment and hiring of plaintiff and their relations to each other and concealed nothing and that said attorney advised the issuing of the warrant offered in evidence and that defendant believed said advice to be sound, and in good faith acted thereupon without malice, then there was probable cause for the issuing of said warrant and the arrest of the plaintiff, if the jury so find, and their verdict must be for the defendant."

By the defendant's fourth prayer, the jury were instructed, that if they shall find that the defendant, in reference to the institution and prosecution of the charge complained of, acted *bona fide* and without malice, under the professional advice and direction of her counsel, Mr. Spessard, that she then and there stated to her counsel all the material facts that she knew at the time were capable of proof, or which by the exercise of reasonable diligence she could have ascertained, and concealed nothing material, that she then believed said advice to be sound, then she is not liable, and the plaintiff cannot recover in this action, even though Mr. Spessard's advice may not have been sound, and although, but for such advice the defendant would have had no probable cause for her action.

It will be seen, that these prayers (third and fourth) were granted in connection with the plaintiff's first prayer, and the jury were told by the first instruction, that if they find the facts set forth in either the third or fourth prayers granted on the part of the defendant, then the plaintiff was not entitled to recover, and their verdict must be for the defendant even though the jury may find the facts set forth in the plaintiff's first prayer.

The jury were instructed by the first prayer, after setting out the facts in the prayer, "and that the defendant procured the arrest and prosecution of the plaintiff before the said

justice of the peace under such circumstances as would not have induced a reasonable and cautious person to have undertaken a prosecution from public motives, then there was no probable cause for said prosecution, and the jury may infer in the absence of sufficient proof to satisfy them to the contrary, that said prosecution was malicious in law, and their verdict may be for the plaintiff, unless the jury find the facts set forth in the defendant's third or fourth prayer."

The jury were not only at liberty, if they found the facts, set out, in either the defendant's third or fourth prayers to find a verdict for the defendant but they were instructed by the plaintiff's first prayer, if they so found, then the plaintiff was not entitled to recover, and their verdict must be for the defendant even if the jury may find the facts set forth in the plaintiff's first prayer.

The plaintiff and defendant's granted prayers (these prayers will be set out by the Reporter, in his report of the case) in our judgment, fairly submitted the law of the case, as applicable to the two main facts and propositions, at issue, that is, the want of probable cause for the prosecution and malice, as the motive of the prosecution.

In *Metcalf v. Brooklyn Ins. Co.*, 45 Md. 204, it is said: "The union of these two conditions, is essential to the injury, known as malicious prosecution. The absence of either, is fatal to the suit. Malice may be inferred from the want of probable cause, but where probable cause exists, malice, however intense, will constitute no cause of action."

It does not appear, that the defendant in this case could have been injured by the modification of the third prayer, in view of the other granted prayers, and the ruling of the Court in this respect even if erroneous, could form no ground for a reversal.

Finding no reversible error in the rulings of the Court, the judgment will be affirmed.

Judgment affirmed, with costs.

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Syllabus

WILLIAM C. TARR

vs.

MILTON L. VEASEY.

Contracts: assignment; personal trust and confidence; right and liability.

Where a contract provides for mutual rights and liabilities, the latter can not be avoided by assignment, and the rights retained. p. 206

Where the rights and powers conferred by a contract involve personal trust and confidence, the contract is not assignable. pp. 206, 207

Decided January 26th, 1915.

Appeal from the Circuit Court for Worcester County. In Equity. (PATTISON, C. J., JONES and STANFORD, JJ.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Geo. M. Upshur (with whom was *Franklin Upshur* on the brief) and *Wm. F. Johnson* (who also filed a brief), for the appellant.

John W. Staton and *Geo. H. Meyers*, for the appellee.

URNER, J., delivered the opinion of the Court.

An agreement in writing under seal, dated "this —— day of November," 1910, between Oliver D. Collins and William C. Tarr, of Worcester County, provided for the sale of a tract of six hundred and forty acres of land in that county by Mr. Collins to Mr. Tarr in consideration of the sum of eleven thousand dollars. It was recited that the property sold under the agreement had been purchased by Mr.

Collins on or about November 15, 1910, from the L. J. Houston Company. The transfer of the property to Mr. Tarr was agreed to be made on or before December 15, 1910, and the purchaser covenanted that simultaneously with the conveyance he would execute and deliver to the vendor a mortgage for the full amount of the purchase money based upon a bill obligatory payable on demand. It was further stipulated that Mr. Tarr should present for discount to the First National Bank of Snow Hill his demand note for \$10,000.00, which Mr. Collins agreed to endorse and the proceeds of which were to be placed to his credit. The note was stated to be for the same indebtedness to be represented by the mortgage. The agreement then provided: "That in the event of a sale of said property that the said William C. Tarr shall be entitled to the proceeds thereof up to thirteen thousand dollars plus interest on eleven thousand dollars from the date of the execution of the mortgage aforesaid to the date from such resale thereof and that the said Collins and Tarr shall divide equally the profits thereover in the proportion of forty per cent. to the said Oliver D. Collins and of sixty per cent. to the said William C. Tarr. The proceeds from such to be applied forthwith to the payment of said note and mortgage. And it is further agreed that no sale of said property shall be made except by the consent of the said Oliver D. Collins."

According to the terms of the purchase from the L. J. Houston Company, as shown by its receipt to Mr. Collins dated November 15, 1910, acknowledging the payment of \$1,000.00 on account of the total price of \$10,000.00, the balance of the purchase money was to be paid on or before December 15, 1910, and the vendee was then to receive a deed for the property. In view, however, of the agreement between Collins and Tarr the latter was substituted for the former as the grantee in the deed from the Company when the transaction was consummated. The conveyance was made on December 15, 1910, the remaining \$9,000.00 of the purchase money having been paid at that time out of the pro-

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ceeds of the \$10,000.00 note to which we have referred, the balance of the fund produced by the discounting of the note being used to pay a note previously discounted by the same maker and endorser to provide the first payment on the purchase. Simultaneously with the delivery of the deed to Mr. Tarr he and his wife executed a mortgage to Mr. Collins which recited that it was given in consideration of the sum of eleven thousand dollars advanced by the mortgagee for the purchase of the property thereafter described, and represented by the bill obligatory of the mortgagors dated December 15, 1910, and payable on demand with interest from date.

The \$10,000.00 note discounted in bank was made payable in four months instead of being drawn as a demand note as originally intended. There were four renewals of the note for like periods and for the same amount. The last renewal matured on April 15, 1912, but about two months prior to that date Mr. Collins, by an instrument under seal, and in consideration of the sum of \$1,500.00, assigned to Milton L. Veasey all his rights and interests under his contract with Mr. Tarr of November, 1910, and further agreed to assign to Mr. Veasey the \$11,000.00 mortgage for the sum of \$10,-291.80 to be paid on or before April 15, 1912. Shortly before the execution of this instrument Mr. Collins had notified Mr. Tarr that he intended to sell out his interest under their contract and, to use his language: "Wash my hands of the whole thing." The agreement between Collins and Veasey provided that if the former should be obliged by law to accept payment of the mortgage, prior to its transfer to Mr. Veasey, by any one legally entitled to make such payment and demand its assignment, the sum of \$1,000.00 out of the consideration of \$1,500.00 paid by Mr. Veasey should be refunded. Within a few days after the date of this agreement the \$10,000.00 note in bank was paid by Mr. Tarr with the proceeds of a new note discounted by the bank upon which he had secured the endorsement of Mr. Emerson G. Polk. On the date of this transaction, which relieved Mr. Collins

of liability on his endorsement, he assigned to Mr. Polk the mortgage on the property in question to the amount of \$10,000.00 of the principal and some accrued interest. The remaining \$1,000.00 of the mortgage debt was transferred to Mr. Veasey as an equivalent performance of the agreement to repay him that amount upon the contingency stated. This interest in the mortgage was later satisfied by payment to Mr. Veasey from the mortgagor. Mr. Polk assigned his portion of the mortgage debt to the First National Bank of Snow Hill as collateral security for the note bearing his endorsement.

On February 20, 1912, Mr. Veasey filed the pending bill of complaint against Mr. Tarr alleging that the plaintiff, as the assignee of the right of Mr. Collins under the agreement of November, 1910, is the owner of an equitable interest in the tract of land to which it refers, and is entitled to a due proportion of the profits which may be derived from a sale of the property, and charging that the defendant, without the plaintiff's consent, was preparing to cut down and remove and convert to his own use the growing timber which covers the greater part of the land and constitutes its principal value. It was averred that such action on the part of the defendant would cause irreparable injury to the plaintiff, and relief was sought by way of injunction. A preliminary writ was granted in accordance with the prayer of the bill. The defendant filed a demurrer, but before the questions it sought to raise were heard and determined, the plaintiff, after obtaining leave of Court for the purpose, amended the bill by alleging in substance that the provision in the contract between Collins and Tarr to the effect that no sale of the property should be made except by consent of Collins was of doubtful validity, but that the agreement was entered into not only for the purpose of a resale of the land as a whole, as stated in the original bill, but also with a view to a reasonably early sale, in order that the parties might participate in the profits arising from such resale in the proportions designated, and that the defendant was attempting to treat the

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land as his exclusive property and was denying to the plaintiff any interest therein, notwithstanding the execution of the assignment under which he claims, and that the defendant was undertaking to remove the timber from the land under the pretense of being the sole owner. It was further alleged that when the property was purchased under the agreement between Collins and Tarr it was valued by them at an amount much in excess of the sum of \$13,000.00, for the application of which the contract first made provision, and that it is now worth considerably more than that sum, and if sold as a whole, in pursuance of the agreement, the plaintiff will receive as his share of the profits a substantial return on his investment. The bill prayed that a receiver be appointed to sell the land and distribute the proceeds to those entitled under the agreement, and that in the meantime the preliminary injunction be made permanent and the defendant be restrained from selling, disposing of or encumbering the property.

A demurrer to the bill as amended was overruled, and the defendant then filed an answer admitting the allegation that he was about to remove the timber, but denying that the agreement required a sale of the land to be made, and asserting complete ownership in himself as against the plaintiff's claim of a concurrent interest. The testimony in the case established without dispute the essential facts we have mentioned, but it involved a serious conflict as to the understanding of the original parties to the agreement with respect to its real scope and purpose. Upon final hearing a decree was passed perpetually enjoining the defendant from cutting down and removing the timber growing upon the land, and from selling, disposing of or encumbering the property, except with the consent of the plaintiff. It was stated in the decree that the Court refrained for the time being from appointing a receiver, pending the sale or other disposition of the land within a reasonable period by mutual consent of the parties. From this decree the defendant has appealed.

It will not be necessary, for the purposes of our decision, to consider the parol evidence relating to the antecedent negotiations of the parties to the Collins-Tarr agreement as reflecting upon their intention in regard to a resale of the property, or to discuss the exceptions to the admissibility of such testimony, because we think the real understanding upon that subject is apparent from the terms of the contract. While the apportionment of the surplus proceeds of the land is provided for "in the event of a sale," yet it is clear from the other stipulations that this event was intended to be certain and not contingent and to occur within a comparatively brief period of time. The provisions for the financing of the transaction on Mr. Collins' credit required that the note discounted in bank and the bill obligatory secured by the mortgage should be made payable *on demand*. By virtue of a power of sale contained in the mortgage, and the right vested in the mortgagee to mature by demand the secured obligation, Mr. Collins was placed in a position to insist upon a sale of the land at such time as he deemed most suitable. In addition to the protection thus afforded to his interests, the contract provided that no sale of the property should be made without his consent. This was evidently not designed to operate as a general or permanent restriction upon the alienation of the property by the holder of the legal title. It merely contemplated an agreement by both the parties interested in the land upon the question of the price to be realized from a sale which they proposed to effect in the near future. It was certainly not the purpose of the contract that the application and apportionment of proceeds which it prescribed should be dependent upon the contingency of a sale at some indefinite and possibly remote period by the owner of the equity of redemption. The fact that the mortgage was taken for an amount in excess of the actual purchase price tends to support the view that it was executed in furtherance of a speculative enterprise and was not regarded as an ordinary investment. The various provisions of the contract, when considered together, are in our opinion consistent only with

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the theory that its object was a resale of the land at a considerable profit and at an early date.

The record shows that Mr. Collins desired and endeavored to accomplish a sale, but did not succeed in securing the cooperation of the defendant, who urged that larger returns could be obtained by removing and selling the timber which gave the land its chief value. This attitude on the part of the defendant, and his preparation for carrying into effect the policy he preferred, were the causes which induced Mr. Collins to undertake the disposition of his contractual interests. As a result of his effort to accomplish that purpose he has been relieved of his liability on the purchase money note discounted in bank, and his mortgage indemnity for that indebtedness has been assigned to the new endorser, while his right to share in the proceeds of the sale of the property has been made the subject of assignment to yet another stranger to the original contract. In thus divesting himself of his interests under the agreement Mr. Collins has separated the liabilities which he had incurred from the right which he would have been entitled to assert. This course was plainly incompatible with the continued integrity of the agreement. The rights and liabilities of the respective parties to its execution were interdependent and indivisible. If Mr. Collins had proposed to enforce rather than to transfer the contract, his ability to maintain a suit for its specific performance would have depended upon his readiness to fully perform it on his part according to its terms. It is clear that he could not have demanded a sale of the land and a share of the proceeds unless he continued to furnish by his endorsement the financial credit upon which the venture was dependent. The release of his liability by the substitution of another endorser was the direct consequence of his notice to Mr. Tarr of his intention to dispose of his interests and "wash his hands" of the transaction. It is apparent from the terms of the memorandum of assignment from Mr. Collins to Mr. Veasey that this very result was anticipated. The stipulation in reference to the mortgage allowed its transfer to be postponed

until the date of the maturity of the existing renewal note, and was contingent upon an assignment not being exacted by some person legally entitled to make such a demand. It was evidently supposed that a substituted endorser would have that right, and when one was secured he immediately asked for and received an assignment of the mortgage, except as to \$1,000.00 of the consideration it mentioned, which the mortgagor subsequently paid. The case, therefore, is one in which a party to an executory contract has caused its virtual rescission as to the burdens which it imposed upon him, and has attempted to assign to another the benefits which he might have claimed under its provisions. The assignee who brings this action is seeking to compel a sale and to share in the profits without having assumed the liability with which the right he asserts was inseparably connected and in consideration of which it was created. It is a well settled principle that rights which are coupled with liabilities under a contract cannot be assigned. 4 *Cyc.* 22; *Pollock on Contracts*, 8th Ed., 499; *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U. S. 379. The plaintiff's claim is directly opposed to the terms and policy of this rule.

But apart from this feature of the case an equally serious bar to an effectual transfer of the right here sought to be enforced is the fact that the sale was required to be made with the consent of the party who has undertaken to make the assignment. This provision, of course, contemplated a consultation and agreement as to the price and terms of the sale. The party in whose name the title was taken confided, as to those very important matters, in the judgment and goodwill of the other contracting party, and was willing to rely upon his disposition to be fair and reasonable in the giving or withholding of his consent. But no authority was given for the admission of a stranger into such a relationship. The contract clearly involved an element of personal trust and confidence, and the unvarying rule is that, in the absence of the mutual assent of the immediate parties, such an agreement is not subject to assignment. *Brantly on Contracts*

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270; *Bishop on Contracts*, 2nd Ed., sec. 1182; *Elliott on Contracts*, sec. 1435; *Clark on Contracts*, 2nd Ed., 364; Case note to *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.* (147 N. C. 368), 23 L. R. A. (N. S.) 223.

The rule was thus stated in *Delaware County v. Diebold Safe Co.*, 133 U. S. 488, and in *Burck v. Taylor*, 152 U. S. 651: "A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract, including both his rights and his obligations, cannot be assigned without the consent of the other party to the original contract."

This doctrine was applied in the case of *Eastern Advertising Co. v. McGaw*, 89 Md. 72, to an attempted assignment of a contract for displaying the defendant's advertisement cards in street cars for a stated period. The cards were to be approved as to style and contents by the advertising company. As the contract thus involved the exercise of skill and judgment on the part of that agency its assignment to another company without the defendant's consent was held to be ineffectual to confer any of the contractual rights upon the assignee.

The principles we have considered are controlling upon the question as to the right of the plaintiff to enforce the agreement in controversy, and we must hold that his suit is not maintainable.

There were other defenses interposed which the learned Court below properly overruled, and which we do not find it necessary to discuss, but we are unable to concur in the conclusion, indicated in the decree, as to the efficacy of the assignment upon which the suit is predicated.

Decree reversed, with costs and bill dismissed.

THE BALTIMORE BRIDGE CO.

vs.

THE UNITED RAILWAYS AND ELECTRIC CO.

Contracts: liquidated damages.

Where the parties, at or before the time of the execution of a contract, agree upon and name a sum therein to be considered as liquidated damages in lieu of anticipated damages which are, in their nature, uncertain and incapable of exact ascertainment, such sum will be regarded as *liquidated damages*, unless the sum so agreed upon is so grossly excessive and out of all proportion to the damages that might reasonably be anticipated.

pp. 214-215

In such cases, the intention of the parties is one of the essential facts, and is to be sought from the contract itself, and from a consideration of all the facts and circumstances with which the parties were confronted at the time of the execution of the contract.

p. 215

If it should appear that the damages actually sustained were in fact less than the sum so stipulated, such sum is not, for that reason, to be characterized as a penalty, unless it be so exorbitant as to show that it was not a *bona fide* effort, made at or before the execution of the contract, to estimate the damages reasonably to be anticipated.

p. 215

But if the amount stipulated is found to be inadequate, the parties are still bound by the agreement, and no greater sum can be recovered.

p. 215

A contract by a street railway company with a bridge company, for the rebuilding of a viaduct that carried the railway tracks over a stream, provided, among other things, for the payment of \$25.00 a day for each and every day's delay beyond the time stipulated for the completion of the work; the contract specifically declared that such payment "was to be as liquidated damages, and not as a penalty, as time was of the essence," and it was impossible at the time of entering upon the contract to estimate the substantial damages that delay would cause the

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railway company. *Held*, that, in considering the actual damages caused the company, the inconvenience and expense of operating its cars over the structure, and of protecting the passengers and employees, while the work was in progress, and further the loss of fares occasioned if timid people were deterred from using the cars, could all be taken into account, and that the liquidated damages claimed were not excessive. p. 219

The ruling of a trial court in refusing to allow certain questions to be asked a witness, does not constitute reversible error, when the testimony so sought to be adduced was elsewhere admitted without objection. p. 219

Decided February 9th, 1915.

Appeal from the Baltimore City Court. (SOPER, C. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Joseph N. Ulman and *Clarence A. Tucker* (with whom were *Samuel J. Harman* and *Charles H. Knapp* on the brief), for the appellant.

Robert F. Leach, Jr., Assistant City Solicitor (with whom was *S. S. Field, City Solicitor*, on the brief), for the appellee.

PATTISON, J., delivered the opinion of the Court.

The appellant, the Baltimore Bridge Company, on the 12th day of April, 1911, entered into a written agreement with the United Railways and Electric Company of Baltimore, the appellee, to do certain work, and furnish the material therefor, upon a viaduct of the appellee company known as the Huntington Avenue Viaduct, in the City of Baltimore, for which it was "to be paid for the full completion of the work: Steel work, \$5,845.87; concrete floors, \$453.00; concrete foundations or footings, \$9.00 per cubic yard."

By the terms of the contract the work was to be completed "within four months from the date of the agreement, or sooner if possible," and if not completed at such time the appellee company was authorized to retain as liquidated damages the sum of twenty-five dollars for each day the work remained unfinished after the date designated for its completion.

The exact wording of the agreement in respect to this provision is that "time shall be of the essence of this agreement, and for each day the completion of the work is delayed beyond the time hereinbefore limited as the time for its completion, the contractor agrees that the company may retain from the final payment to be made hereunder the sum (\$25.00) indicated in Schedule E forming part hereof. It being impossible at the time of entering into this agreement to estimate the substantial damage which will result to the company from such delay, the said sum is agreed upon as the liquidated damages which the company will suffer each day by reason thereof and not as a penalty, any decision or ruling of the Courts to the contrary notwithstanding."

The work under this agreement was not completed until the ninth day of October, 1911, fifty-nine days after the date designated for its completion.

The compensation that was to be paid under the contract for the work done and material furnished, had it been completed at the time named in the agreement, amounted to \$6,931.57. Of this amount the appellee company retained, as liquidated damages, \$1,475.00, or twenty-five dollars for each of the fifty-nine days the work remained unfinished after the date named in the contract for its completion, and paid the balance (\$5,456.57) to the appellant company.

It was to recover the amount so retained by the appellee that the suit in this case was instituted. At the conclusion of the case the Court directed a verdict for the defendant, and upon such verdict a judgment was entered thereon for the defendant. It is from that judgment this appeal is taken.

Md.]

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The work was satisfactorily done, and the inquiry here is, whether the amount stipulated in the agreement to be paid by the appellant in the event of its failure to complete the work within the designated period, is to be regarded as liquidated damages or as a penalty.

It is contended by the appellant that the amount so retained was designed to be, and in fact was, a penalty; while the appellee contends that the sum named was intended to be, and in fact was, liquidated or stipulated damages that were agreed upon at the time of the execution of the agreement to be retained by it should the appellant company fail to complete the work within the designated period.

It was said by JUDGE McSHERRY in *Willson v. Mayor and City Council of Baltimore*, 83 Md. 210, "Whether a sum named in a contract to be paid by a party in default on its breach is to be considered liquidated damages or merely a penalty is one of the most difficult and perplexing inquiries encountered in the construction of a written instrument. The solution of that question * * * depends in a large measure at least upon the particular facts and circumstances of each separate case. * * * A stipulation to pay a specified sum upon the non-performance of a contract is regarded as a penalty rather than as liquidated damages if the intention of the party as to its effect is at all doubtful or is of equivocal interpretation * * * and where * * * the damages for a breach thereof are easily and exactly ascertainable.

"It is equally well settled that a sum, if it be at all reasonable and is stipulated to be paid as liquidated damages for the breach of a contract, will be regarded as such, and not as a penalty, where from the nature of the covenant the damages arising from its breach are wholly uncertain and cannot be ascertained upon an issue of fact." *Willson v. Mayor and City Council of Baltimore, supra.*

In the case of *Geiger v. The Western Md. R. R. Co.*, 41 Md. 15, our predecessors said: "Where the parties have declared in clear and unambiguous terms that a certain sum shall be paid by way of compensation, upon a breach of the

contract, * * * the damages arising from the breach of which are uncertain, and incapable of being ascertained by any fixed pecuniary standard, and especially where the contract provides that the sum so claimed shall be paid as *liquidated damages*, the sum so fixed and agreed upon will be considered as compensation for damages resulting from the breach, and not as a penalty." See cases there cited, also *Crawford v. Heatwold* (Va.), 34 L. R. A. (N. S.), 587; *Stratton v. Fike*, 166 Ala. 210; *Railroad Co. v. Gaba*, 78 Kan. 432; *Nilson v. Jonesboro*, 57 Ark. 168; *Ward v. Hudson River Bldg. Co.*, 125 N. Y. 230; *Barber Asphalt Paving Co. v. City of Wabash*, 86 N. E. 1036; *Wallace Iron Works v. Monmouth Park Assn.* (N. J.), 19 L. R. A. 456.

In the more recent case of the *United Surety Co. v. Summers*, 110 Md. 95, in which the agreement between Lawrence, a builder and contractor, and Summers, for the furnishing and erection of the re-enforced concrete work in and about a certain building then in course of erection, provided that in case the work was not completed within seventy working days Lawrence should pay to Summers, the owner, fifty dollars for each day in excess of seventy days occupied in the work, the rule was again stated by JUDGE PEARCE, speaking for the Court and quoting from *Ward v. Hudson River Bldg. Co.*, *supra*, to be, that "Where the parties have stipulated for a payment in liquidation of damages, which are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount is not, on the face of the contract, out of all proportion to the probable loss, it will be treated as liquidated damages." And the stipulation in that case was held to be for liquidated damages and not a penalty. See also cases of *Filston Farm v. Henderson*, 106 Md. 355; *Graham v. Cooper*, 119 Md. 358.

In 2 *Joyce, Damages*, paragraph 1297, it is stated: "That in order to determine whether a sum named shall be considered liquidated damages or penalty, Courts must look at

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the language of the contract, the intention of the parties to be gathered from all of its provisions, the subject of the contract and its surroundings, the ease or difficulty of ascertaining the damages recoverable for a breach, the sum designated by the parties, and from all these factors determine what view shall be taken of the question in good conscience and equity." *Turner v. Fremont*, 170 Fed. 259. "And where from the nature of the contract the damage cannot be calculated with any degree of certainty the stipulated sum will easily be held to be liquidated damages where they are so denominated in the instrument." *Hennessy v. Metzger* (Ind.), 38 N. E. 1058.

The Supreme Court of the United States in the case of *Sun Printing and Pub. Assn. v. Moore*, 183 U. S. 662, 46 Lawyers Ed. 378, said: "This Court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the Court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract. Thus, CHIEF JUSTICE MARSHALL, in *Taylor v. Sandiford*, 7 Wheat. 13, 5 L. Ed. 384, although deciding that the particular contract under consideration provided for the payment of a penalty, clearly manifested that this result was reached by an interpretation of the contract itself."

The Court in the case of *District of Columbia v. Harlan & H. Co.*, 30 App. Cases, Dist. of Columbia, 278, said: "There is nothing to prevent the parties from stipulating in advance that a certain sum shall be the damages which one shall forfeit to the other for failure to perform the conditions of a valid contract. Especially is this true where the damages to be sustained are uncertain in amount and cannot easily be ascertained. In the case at bar the actual amount of dam-

age that might accrue because of the failure of the plaintiff to complete the fire boat within the time stipulated would be difficult to anticipate. The loss that might be sustained by the absence of an important part of the equipment of the fire department, such as this boat, might be inestimable. The fact that a fire did not occur during the period of delay is immaterial. We are here concerned with the conditions that confronted the parties when the contract was made and the clause for damages in case of delay was inserted. It was the possible damage that might accrue from delay that governed the parties in fixing in advance the amount that should be regarded as settled and liquidated damages."

In the case of *Blackwood v. Liebke*, 87 Ark, 545, where the party was not actually damaged, as disclosed at the termination of the contract, owing to the fact that the price of an article there involved increased in market value after the breach of the contract, resulting beneficially to the defendant, the Court there said: "The question is not as to the status of the parties at the time when the contract terminated, but as to the status of the parties at the time they made the contract. It may be as the contract works out that it would be easy to ascertain the damage for the breach of it or to prove that there were none. But if the status of the parties at the time of the contract was such that it would be difficult or impossible to have anticipated the damage for a breach of it, and there was a positive element of damage, then under the authorities there is no reason why that may not be anticipated and contracted for in advance."

From the authorities given above it may be stated as a settled rule of law, that where the parties, at or before the time of the execution of the contract, agree upon and name a sum therein to be paid as liquidated damages, in lieu of anticipated damages which are in their nature uncertain and incapable of exact ascertainment, that the amount so named in the agreement will be regarded as liquidated damages and not as a penalty, unless the amount so agreed upon and

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inserted in the agreement be grossly excessive and out of all proportion to the damages that might reasonably have been expected to result from such breach of the contract. And whether it is excessive or whether the damages are incapable of exact ascertainment should be determined from the subject-matter of the contract considered in the light of all the surrounding facts and circumstances connected therewith and known to the parties at the time of its execution. That these questions should be considered and determined from the contract itself, its subject-matter and the surrounding facts and circumstances connected therewith with which the parties are confronted at the time of its execution, is made necessary in order to ascertain the intention of the parties, which is one of the essential factors in deciding whether the stipulation is for liquidated damages or is a penalty. It may afterwards be disclosed that the damages actually sustained are more or less than those anticipated at the time of the execution of the contract. If more, this fact would not characterize or stamp the stipulation as a penalty unless it was so exorbitant as to clearly show that such amount was not arrived at in a *bona fide* effort, made at or before the execution of the contract, to estimate the damages that might have been reasonably expected to result from a breach of it, and that it was named as a penalty for such breach. And on the other hand, if the amount stipulated was found to be inadequate, a greater amount could not be recovered for such breach, because of the agreement between the parties that the amount so named should be in lieu of the damages resulting therefrom.

The agreement in this case expressly asserts that time is the essence of the contract, and it specifically stated that the amount to be retained upon the failure of the appellant to complete the work within the designated period is for liquidated damages "and not as a penalty." In it, too, it is said that the anticipated damages resulting therefrom were not susceptible of exact ascertainment. Whether the damages resulting therefrom were ascertainable, and whether the

amount agreed upon as liquidated damages is excessive, are questions that must be determined in deciding the character of the stipulation in the contract before us, by applying the rule as above stated.

The appellee, the United Railways and Electric Company of Baltimore, at the time of the execution of the contract was operating a city passenger railway in the City of Baltimore and its suburbs, the tracks of which passed over a bridge or viaduct spanning a depression and known as the Huntington Avenue Viaduct. Pursuant to a general plan or system inaugurated by the City of Baltimore to improve and to connect certain parks of the city, it was decided by the Park Commissioners to build a road connecting Druid Hill Park with Wyman's Park, which road was to pass under the aforesaid viaduct. To do so it was found necessary to remove certain of the supports of the viaduct and to build an arch therein sufficiently wide to enable the city to build its road thereunder. It was agreed between the railway company and the city that the company should contract for and supervise the necessary alterations to be made in the viaduct and that the city would pay the cost thereof. Pursuant to this agreement, the railway company contracted with the appellant, the bridge company, to make such alterations. The fact that the cost of this work was to be borne by the city and that it was interested in its prompt completion was brought home to the knowledge of the appellant company.

In the contract we find certain provisions in which the interest of the city in the proper performance of this work is recognized. In it we find the provision that the bridge company is to indemnify the railway company and the *Mayor and City Council of Baltimore* for any and all claims or demands due to any actual or alleged infringement of patent or patent rights in the making, vending or using of any article or device used for and in connection with the work. And in another section of the contract is found the provision whereby the bridge company agreed to procure a policy of

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insurance insuring the railway company and the *Mayor and City Council of Baltimore* against all claims and suits for damages of any kind resulting either from the character of the work or the performance thereof, and agreeing to defend all actions that might be brought against said corporations. And in the contract is found the further provision that the appellant company should furnish to the company and to the Mayor and City Council of Baltimore a good and sufficient bond * * * with the Fidelity and Deposit Company of Baltimore as surety, so conditioned as to guarantee the performance on the part of the contractor of this agreement in all its particulars.

Although the city was so recognized by the contract as being interested in the work to be done by the appellant, and in its early completion, so that it could complete its road under the aforesaid viaduct, the provision for liquidated damages is silent as to the city; the language therein used is that "It being impossible to estimate the substantial damage which will result to the *company* from such delay, the said sum is agreed upon as liquidated damages which the *company* will suffer." And it is argued by the appellant, and we think with much force, that under the contract the parties thereto in arriving at the amount to be paid as liquidated damages, should have considered only the anticipated damages to the railway company resulting from such breach of the contract.

Without deciding this question, for we think it unnecessary to do so, we will confine our inquiries to such damages.

The record discloses that at the time of the execution of the contract before us, there existed a written agreement, dated the 27th day of March, 1911, between the railway company and the city in relation to the subject-matter of the agreement between the railway company and the appellant company, indemnifying the railway company for the undertakings and obligations assumed by it in its contract with the appellant company, but this contract, although offered in evidence, was excluded upon the objection of the appellant, and

its contents do not appear in the record and are unknown to us.

It is said, however, by Walter Bush, secretary of the appellant company, who largely "handled" the negotiations for has company which resulted in the execution of the contract, that he was told by the representative of the railway company. after his company had accepted the bid to do the work within a period of three months, and upon his hesitancy or refusal to sign a contract containing the aforesaid damage clause, that his refusal to do so "placed the railways in a very embarrassing position, because they in turn had made an agreement with the City Park Board which was based on the plaintiff's quotation and that it was rather late in the day for the plaintiff to withdraw." What covenants, if any, were made by the railway company to the city in the aforesaid contract by which they were to become liable to the city for the loss or damage it might sustain because of the failure to complete the work within the time named, are not disclosed by the record. If the said contract contained such covenants, then any anticipated damages resulting to the company by reason of a breach thereof, occasioned by the aforesaid breach of the contract with the appellant company, could have been properly considered with the other anticipated damages in determining the amount of the liquidated damages to be inserted in the agreement.

Our attention is called to a provision in the contract which provides that the work should "be handled at such times and in such manner as not to interfere in any way with the continuous operation of the company's equipment over the viaduct pending the reconstruction provided for by this contract." As disclosed by the record, it is conceded on the part of the appellee company that this provision of the contract was complied with, or more correctly speaking, that "they had not suffered any delay whatever from the work." This expression cannot be construed to mean that they never suffered *any* damage by reason of the failure of the appellant

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company to complete the work within the time designated. But if it could be so considered, it could not have the effect of converting a stipulation which, under the rule stated, would be for liquidated damages into a penalty.

There is no evidence appearing in the record that the stipulated amount was under the rule excessive, or that the anticipated damages reasonably expected to result from a breach of the contract were easily ascertainable.

Many cars of the appellee company were run over this viaduct each day during the continuance of this work in carrying passengers to and from the city, and although it may have been that during the progress of this work the cars were at no time prevented from, or materially delayed in crossing the viaduct, it no doubt resulted in much inconvenience to the railway company and entailed upon it additional care, caution and labor, in protecting those who traveled upon its road, its employees and others, against the danger incident to such work, all of which was accompanied with additional expense. In addition to this, the railway company was no doubt subjected to other damages, including those resulting from the failure of timid or nervous persons to travel over the viaduct when the alterations were being made, thereby lessening the extent of travel over its road.

These damages, in our opinion, were of such a nature or character as not to be ascertainable by the parties at the time of making the contract, and therefore, under authorities cited, they were permitted to agree upon a stipulated amount to be paid in lieu of such damages, and having so agreed upon an amount, which was not shown to have been excessive, it was for liquidated damages, and was not a penalty.

It is conceded that the work was delayed for fifty-nine days, and therefore, if the appellant is chargeable therefor at the rate of twenty-five dollars a day, the same would amount to fourteen hundred and seventy-five dollars, or the amount retained by the appellee. It is contended, however,

by the appellant that it was delayed in the performance of this work by reason of the non-fulfillment of an alleged promise made by some one or more of the defendant's representatives, before the making of the contract in this case, that it would furnish to it certain strain sheets that had been made out by an engineer of either the appellee company or of the City of Baltimore that would be useful to the appellant in the work that it was to do and would aid it in expediting such work, which provision, however, is not contained in the contract. A number of the exceptions as to the admissibility of testimony is to the rulings of the Court in not permitting questions to be asked and in striking out answers when given in relation thereto. Upon an examination of the record we find that although the witness was not at times permitted to go into this question and give his version of such alleged promise, he was afterwards not only permitted, but urged by the Court to state all that he knew about it, which he did, until he finally said that he had nothing to add to what he had already said. Therefore if this testimony was at all admissible, the rulings complained of could in no sense have been prejudicial to the appellant.

In the action of the Court in refusing to grant the fifth, sixth, seventh and eighth prayers of the appellant predicated upon such theory of the case, we find, no error.

There are other exceptions to the admissibility of evidence as well as to the ruling of the Court in refusing the other prayers of the plaintiff and granting the defendant's prayer directing a verdict for the defendant, but in view of our decision upon the main question we think it unnecessary to refer specifically to each and all of these exceptions. These prayers of the plaintiff we think were properly refused, while the prayer of the defendant was properly granted, and we find no errors in the rulings of the Court upon the testimony, at least no reversible errors. We will therefore affirm the judgment.

Judgment affirmed, with costs, to the appellee.

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Syllabus.

THE AUBURN SHALE BRICK COMPANY, A BODY
CORPORATE,

vs.

THE COWAN BUILDING COMPANY, A BODY
CORPORATE.

Prayers: taking case from jury; too general; when ground for reversal without new trial. Conflicting evidence: for jury.

Guarantees: for debt of another; when to sub-serve own interest. Contracts partly in parol: for jury.

A prayer for the Court to "instruct the jury that, under the pleadings and evidence in the case, the plaintiff can not recover, and their verdict must be for the defendant," is too general, and indefinite, and submits no proposition of law, and should be refused. p. 225

But, in such cases, if upon the whole proof there should appear to be no evidence legally sufficient to enable the plaintiff to recover, the case may be reversed, without granting a new trial. p. 227

Where the declaration was in proper form and its counts sufficient to allow a recovery, if the plaintiff could sustain his theory of the case, such a prayer can not be considered an attack on the legal sufficiency of the declaration. p. 225

Where the evidence in a case is conflicting, it is for the determination of the jury, upon proper instructions. p. 228

Where there is no exception to the admissibility of evidence, and no prayer raising the question of a variance between the pleadings and the evidence, a prayer of this character is too gen-

eral to raise the question of variance between the *allegata* and *probata*. p. 225

Where a contract is partly in writing and partly in parol, it is a question for the jury, and not for the Court, to determine what was the contract between the parties. p. 226

A contract to answer for the debt of another is not within the provisions of the Statute of Frauds, if the real purpose of the defendant was to subserve some purpose of his own. p. 227

Decided February 10th, 1915.

Appeal from the Court of Common Pleas of Baltimore City. (DOBLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

R. Lee Slingluff (with whom were *Chas. E. Cockey* and *James E. Phillips* on the brief), for the appellant.

James Piper and *J. Bannister Hall, Jr.* (with a brief by *Carey, Piper & Hall*), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

At the conclusion of the testimony, on both sides in this case, the Court below granted at the instance of the defendant the following prayer: The defendant prays the Court to instruct the jury that under the pleadings and evidence in this case the plaintiff cannot recover and their verdict must be for the defendant.

The questions for our consideration are presented in the case upon a single exception, and that is to the action of the Court in granting the defendant's prayer, withdrawing the case from the jury and directing a verdict for the defendant.

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By a stipulation of counsel, filed herein on the 11th of November, 1914, correcting the Record, it is agreed that a judgment on the verdict, in favor of the defendant, was entered by the Court on the 15th of June, 1914.

From the judgment so entered, the plaintiff has appealed.

It will be seen, that the suit was in assumpsit and the declaration contained the common counts, in such actions. The defendant pleaded the general issue pleas, and the case was tried upon issue joined on these pleas.

The cause of action as set out in the statement of account and bill of particulars filed in the case, shows the plaintiff's claim to be, for a certain number of face bricks, "manufactured, bargained, sold and provided by the plaintiff for the defendant during the month of February, 1913, with the prices, dates of delivery, and car numbers and also showing credits for freight and over charge, and a balance due the plaintiff of \$1,139.41."

The appellant, the plaintiff below, is a body corporate and engaged in the manufacture of bricks, at Gettysburg, Pa.

The appellee, the defendant below, is also a body corporate, and is a contractor for the erection and construction of buildings, with its principal office in Baltimore City.

On the 17th day of August, 1912, the Baltimore Fidelity Warehouse Company awarded to the appellee, a contract to erect and construct for it at a cost of \$165,500.00 a large warehouse building at the corner of Hillen and High streets, Baltimore, and the contract also included the furnishing of all labor and materials necessary for the completion of the building.

Afterwards, the appellee, contractor, ordered from the Slingluff Supply Company, of Baltimore, face brick amounting to 225,000, to be used in the construction of the building at \$14.50 per thousand.

Subsequently, the Slingluff Supply Company, in turn, contracted with the appellant, to manufacture and deliver the

bricks necessary for the work, at \$10.00 per thousand, *f. o. b.* at the mills of the appellant, Gettysburg, Pa. The two last named contracts are not set out in the Record, but are sought to be established by correspondence in writing between the parties and by the parol testimony in the case.

It is admitted, on the part of the appellant that all of the bricks sold and delivered prior to February 1, 1913, under the alleged Slingluff contract were fully paid for, but it is contended that the 95,000 face brick, here in dispute and shipped in the month of February, 1913, were sold and delivered to the appellee under a new contract, wherein it was agreed, that the appellee should be responsible and would pay for all bricks shipped to it thereafter to be used to complete the warehouse building.

It appears from the Record, that it was admitted by the appellee, in the course of the trial, in the Court below, that "we owe this money either to the Slingluff Supply Company or the Auburn Shale Brick Company. Our theory of the case is that we owe it to the Auburn Shale Brick Company, subject to any right for damages due to the failure of the Slingluff Supply Company to carry out its contract."

The contention upon the part of the appellee, in this Court, is, that the Court below was right in withdrawing the case from the jury, because, first, the evidence failed to show that there was any contract between the appellant and appellee, and, secondly, if a contract has been established it was "a collateral contract of guaranty whereby the appellee agreed to be responsible to the appellant for a debt contracted and to be contracted by the Slingluff Supply Company; or an agreement whereby the appellee agreed not to pay over any money without the consent of appellant to the Slingluff Supply Company which was or might become due under its contract with the Slingluff Supply Company," and there could be no recovery under the common counts of the declaration.

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Opinion of the Court.

It has repeatedly been held by this Court that a prayer in the form in which the defendant's prayer was granted in this case, is too general, indefinite and submits no proposition of law, and should be refused. The prayer raises no question as to the legal sufficiency of the evidence to sustain the plaintiff's claim, and can only be regarded as assailing the sufficiency of the declaration. *Western Md. R. R. v. Carter*, 59 Md. 306; *Dorsey v. Harris*, 22 Md. 88; *Mottu v. Fahey*, 78 Md. 394; *Sumwalt v. Knickerbocker*, 114 Md. 413; *Hobbs v. Battory*, 86 Md. 72.

It is difficult to perceive, under the evidence and pleadings in this case, on what ground or theory the defendant's prayer could have been granted.

It will be seen, that the plaintiff's declaration is in assumpsit and in the usual form, containing only the common counts in assumpsit.

If the prayer is to be treated as an attack on the legal sufficiency of the declaration, it is clear that the ruling of the Court below must be held as reversible error, because the counts in the declaration were proper and sufficient to allow a recovery, if the plaintiff could sustain the theory of its case, by the necessary proof.

There were no exceptions to the admissibility of evidence, and there was no prayer raising the question of variance between the pleadings and the evidence, and it has been frequently held, by this Court, that a prayer of this character is too general in its terms to raise the question of variance or non-correspondence between the *allegata* and *probata*.

In *Cover v. Smith*, 82 Md. 586, this Court, in dealing with a similar question on a general prayer, in an action of assumpsit, said: "It was argued at some length that this prayer raised the question of variance between the pleadings and the evidence and that such existed. It is a dangerous practice to permit such a question to be raised by a general prayer of this kind, as this Court cannot say that the attention of the Court below, or the attorneys for the plaintiff,

was in fact called to the alleged variance so as to give an opportunity for amendment, if necessary, in that Court."

In *Casey v. Suter*, 36 Md. 4, this Court said: "If the defendant designed to raise this point he should have done so by excepting to the admissibility of the testimony when offered or by a prayer asking its exclusion from the consideration of the jury on that ground, or presenting the question of variance or non-admissibility under the issues in direct and positive terms, so that the plaintiff could have had in the Court below an opportunity to amend his *narr.*, by adding an appropriate and an additional count." *Straus v. Young*, 36 Md. 255.

But if it be conceded that the question of variance between the allegations and proof was properly before the Court, and a variance existed, it would not avail the defendant on this appeal, because under the defendant's contention and its admissions as contained in its brief, and set out in the record, the judgment would have to be reversed and the case remanded for a new trial, so as the plaintiff could recover by a proper amendment of its declaration. *Norris v. Graham*, 33 Md. 56; *Turner v. Maddox*, 3 Gill, 196.

But apart from this, we think, there was sufficient evidence, on the record now before us, to have taken the case to the jury, upon the plaintiff's proof.

The contract between the appellant and the appellee under which a recovery was sought, it will be seen, was partly in writing and partly in parol, and this being so, it was a question for the jury and not for the Court, to determine what was the contract between the parties.

In *Story on Contracts*, sec. 818, it is said, if a contract is to be made out partly by written documents and partly by oral evidence, the whole becomes a question for the jury. 1 *Taylor on Evidence*, sec. 36; *Roberts v. Bonaparte*, 73 Md. 200; *Leftwich v. Royal Ins. Co.*, 91 Md. 612.

In *Lumber Co. v. Israel Congregation*, 100 Md. 129, which was a case of this character, the Court held, that the evidence was sufficient to take the case to the jury and if the

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jury find that the main object of the defendant was not to answer for the debt of the contractor but to subserve his own purpose, the defendant's promise is not within the *Statute of Frauds* and if the jury find that the credit for the lumber was given to the defendant, the plaintiff is entitled to recover. *Marchant v. Hughlett*, 118 Md. 239; *Booth v. Irving Nat. Ex. Bank*, 116 Md. 676; *Eckels v. Cornell Co.*, 119 Md. 107.

In *Oliver & Burr v. Noel Co.*, 109 Md. 466, it was held, that plaintiff's promise to be responsible for any loss, if defendant would pay the C. Company, was not a contract of guaranty, but was an original undertaking. *Oldenburg v. Dorsey*, 102 Md. 172; *Dryden v. Barnes*, 101 Md. 352; *Huff v. Simmers*, 114 Md. 549.

We cannot adopt the appellee's contention in view of the evidence set out in this record, that this is a case in which the judgment should be affirmed or reversed without a new trial, notwithstanding the error in granting the defendant's prayer.

The class of cases such as *Pearre v. Smith*, 110 Md. 531; *Norris v. Conn. Fire Ins. Co.*, 115 Md. 174; *Neubold v. Bradstreet*, 57 Md. 38, relied upon by the appellee, are entirely unlike this. In those cases, the Court held, that upon the whole proof, there was no evidence legally sufficient to entitle the plaintiff to recover, notwithstanding the error in the form of the prayer.

In the present case the Court would not have been justified upon the whole proof, in granting a prayer, in proper form, directing a verdict, in favor of the defendant, upon the ground, that there was no evidence legally sufficient to entitle the plaintiff to recover under the pleadings in the case.

There was evidence upon the part of the plaintiff, that the appellant company on or about the first of February, 1913, refused to manufacture and deliver any bricks thereafter under the Slingluff contract to be used in the construction of the warehouse, unless the defendant, would "be responsible

for all shipments to the completion of the order to the amount of the contract price."

Mr. Oswald, the General Manager of the appellant company, testified, that all the bricks manufactured and shipped for the completion of the warehouse, after February 1st, 1913, were sold to the defendant company, according to the correspondence, conversations and telephonic communications, between the parties, contained in the record.

He further testified, that his company was directed by the defendant company "to go ahead and ship the brick and they would stand good for them;" that according to the contract, with the defendant company, they furnished all the brick that were needed to complete the work on the warehouse, and that the 95,000 bricks were delivered upon the orders of the appellee, at the prices agreed upon, were accepted by them and actually used in the construction of the building.

But even if it be conceded, without reviewing the rest of the testimony in the record, that the evidence was largely conflicting as to what was the contract between the parties and the other material points raised, they were clearly questions to be determined by the jury, upon proper instructions by the Court, on the law of the case. *Sullivan v. Boswell*, 122 Md. 550; *Meyer v. Frenkil*, 113 Md. 46; *Roberts v. Bonaparte*, 73 Md. 191; *Donnelly v. Newbold*, 94 Md. 224.

For the reasons stated, the judgment appealed from must be reversed, because of the error in granting the defendant's prayer, and the case remanded for a new trial.

Judgment reversed, with costs, and new trial granted.

Md.]

Syllabus.

JOSEPH WAGNER, JR.,

vs.

KATHERINE KLEIN AND LOUISA BECKER,
EXECUTRICES.

Executors: suits against; on promises of testator. Mental capacity: evidence of attending physician; evidence of member of family. Prayers: arrangement in such paragraphs not commended.

Upon a trial of a caveat to a will, evidence had been offered and admitted without objection, that the testatrix knew that the witness had worked to pay for medical attendance, etc., for the witness' husband, who was an invalid, and the son of the testatrix, and that the testatrix had said that such payments "would all come back" to the witness; the witness was then asked what in round numbers was the total sum so paid; an objection to the question was sustained, and, on appeal, the ruling of the Court below was held to be correct. p. 232

A physician who, for a number of years, regularly attended a testatrix, is competent to state his opinion as to the testatrix's mental capacity, but he must state the facts and circumstances upon which the opinion is based. p. 233

In the evidence of a caveator, testimony had been adduced tending to show that the testatrix had said that it was not very

pleasant for her at the home of her daughter, because "all that she heard was money"; in rebuttal, the caveatees offered to show that money, investments, rates of interest, etc., and business conditions, were the favorite topics with the testatrix, and since she was not able to read she depended entirely upon what was told her. *Held*, that under the circumstances, the evidence was relevant and admissible. p. 234

Testimony of the testatrix's son-in-law, who had lived with her for 26 years, is admissible to show that he thought her a very staunch business woman. p. 235

While the arrangement of a prayer in separate paragraphs, instead of in the usual form, is not one that is approved, yet it is not always of sufficient moment to warrant a reversal. p. 236

Decided February 10th, 1915.

Appeal from the Baltimore City Court. (SOPER, C. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, UERNER, STOCKBRIDGE and CONSTABLE, JJ.

William Colton, for the appellant.

Joseph N. Ulman and *Clarence A. Tucker* (with whom were *Samuel J. Harman* and *Charles H. Knapp* on the brief), for the appellees.

CONSTABLE, J., delivered the opinion of the Court.

The questions to be determined in this appeal have been raised upon exceptions to the rulings of the Court below, upon the trial of issues framed by the Orphans' Court of

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Opinion of the Court.

Baltimore City, and sent to a law Court for trial, upon the caveat to the will of Josephine Wagner, Sr.

There were five issues, and they involved these questions:

(1) Was the testatrix of sound and disposing mind, memory and understanding; (2) was the alleged will executed in compliance with the provisions of law; (3) was the testatrix subjected to undue influence; (4) was the alleged will procured by fraud, and (5) did the testatrix know or was she informed of the contents and effect of the alleged will at the time of execution.

The will in controversy was executed on the 13th day of January, 1913, during the last illness of the testatrix; she dying on the 24th day of January, 1913. The testatrix was at that time seventy-one years of age. Her next of kin were two daughters and a grand-daughter, a daughter of a deceased son. During the last few years of her life, she had made her home alternately with her daughters, with the exception of a brief period when she lived alone. The will provided for specific money legacies to her great-grandchildren and grandchildren, including the caveator to the will, who is the daughter of the deceased son, and left the residue of the estate to the two daughters.

During the trial, the caveator reserved eighteen exceptions to the ruling of the Court on questions of evidence. All of them, except the fifth, tenth, eleventh, fifteenth, sixteenth, seventeenth and eighteenth, have been abandoned. Exception was also taken to the action of the Court in refusing a number of prayers of the caveator's, and in granting certain of those of the caveatees, but no contention is made over this action other than that from the granting of the seventh of the caveatees. The Court instructed the jury to find, as a matter of law, in favor of the caveatees on the first, second, fourth and fifth issues, thus leaving the issue of undue influence the only one to be determined by the jury. The finding of the jury was in favor of the caveatees, and this appeal is the result.

The fifth exception arose in this way: The widow of the deceased son of the testatrix, and the mother of the caveator, had testified that during the last several years of the life of her husband, he had suffered from an incurable disease, which rendered him incapable of working, and resulted in his death in December, 1912. That, because of his illness, she and her daughter worked at sewing for the support of him and themselves and to enable them to purchase medicines and pay for medical advice for him. She testified that the testatrix knew she paid all the doctor's bills for her husband and that the testatrix had said to her: "It is splendid in you to be able to do it, and every dollar that you have paid out will come back to you." This question, which is the basis of the exception, was then asked the witness: "In round figures, as accurately as may be, can you tell the gentlemen of the jury, how much money you actually did pay out of your earnings for the medical advice and attendance of your late husband, during the last four or five years of his life, to the knowledge of your grandmother?" It would appear from the use of the word "grandmother" that this question was asked of the granddaughter, but the testatrix throughout the whole testimony seems to have been called grandmother by everyone. Assuming the declarations of the testatrix, as to paying money that the daughter-in-law had paid for necessities for her own husband, were admissible under all or any of the issues to be determined, it is difficult to see a reason for going into such a detail as the amount actually paid. All the force that could have been gotten from such a transaction was furnished by the declarations; and to have shown the amount she was expected to repay would have added nothing. It is not even contended that she meant by her declarations to actually repay the amount expended, but rather that the son's wife and daughter would share in her estate to the extent of the son's share. We think this was irrelevant and immaterial to the issues, and, therefore, a proper ruling.

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The tenth and eleventh exceptions can be treated together. for one is to the overruling of an objection to a question and the other is the refusal of the Court to strike out the answer to the same question. Dr. Wirt A. Duvall, a physician of twenty-six years' experience, was the attending physician during the last illness of the testatrix. He had attended her once or twice before. He was called to attend her on the 11th day of January, 1913, and visited her from one to three times daily until the time of her death. He had the usual conversations passing between a patient and her physician, and at times the patient became extremely confidential in her disclosures to him. The doctor, while a witness, was asked the following question: "During these visits, during this illness, beginning on the 11th of January, 1913, you say you saw Mrs. Wagner daily and sometimes more than once daily; what did you observe as to her mental condition during that time?" A. "To put it in one word, I might say, normally, she was a woman of exceedingly good mind, I think." It is not claimed by Dr. Duvall, nor for him by the caveatees, that he is in this case as an expert, as to which class of witnesses the decisions are uniform that they can express an opinion as to the mental capacity of a testator, without first stating the facts and circumstances upon which they base that conclusion; but it is conceded that he falls within the category of non-expert witnesses, who must first give the facts and circumstances upon which their opinion is based. *Waters v. Waters*, 35 Md. 531; *Townshend v. Townshend*, 7 G. 10; *Dorsey v. Warfield*, 7 Md. 65; *Berry Will Case*, 93 Md. 560; *Same Case*, 96 Md. 45. Treating him entirely as a non-expert witness, the record shows fully that his intercourse with the testatrix fully qualified him to express an opinion as to her mental capacity. But it will be noticed that the question is not so broad as to include his opinion as to whether on the day of the execution of the will she was mentally capable of executing a valid will, but is limited to the inquiry as to what he observed as to her mental

condition. Under the issues, we think the Court below was correct in permitting the witness to answer and also in its refusal to strike out the answer.

The fifteenth and sixteenth exceptions will be treated together. During the taking of testimony for the caveator, her mother had testified that the testatrix had told her that it was not very pleasant for her at the house of her daughter, Mrs. Klein, because "all that I hear is money." The caveatees, in an effort to rebut the effect, testimony of this character might have on the issue of undue influence, put on the stand Mr. Klein, the son-in-law, who testified as follows: "Mrs. Wagner always delighted to sit down and talk on money, interest and business, which was one of the happiest parts of her life when she could listen to how money was working, how it was being invested, and she would often drift into municipal affairs. She could not read or write, and she had to depend for all her knowledge on what she heard. She was a great student on that subject. She loved to hear the money question discussed." He then was asked: "Did you or not hold any position with the Building Association or lodge or fraternal order?" and answered, "I did up until six years ago; I was secretary of the Medicine Lodge of Odd Fellows." Upon motion to strike out this answer, the Court refused. The next question was: Q. "Were or not the money affairs of the fraternal order discussed at your home?" The objection to this question was overruled. From the foregoing recital of the testimony, it is clear, under those circumstances, that this testimony was relevant and the ruling of the Court below was correct.

The seventeenth and eighteenth exceptions relate to the objection to a question and the refusal to strike out the answer. The witness Klein was asked: "From your acquaintance with Mrs. Wagner, what are you able to say as to her general characteristics?" A. "I would like to put it as brief as possible, I don't want to go into an eulogy on this matter, but Mrs. Wagner always impressed me as a very

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stanch business woman." This witness had been the son-in-law of the testatrix for twenty-six years, and was on terms of close and intimate relationship with her, she having been a member of his household during a portion of her last years. We think, under the authority of *Townshend v. Townshend*, 7 G. 10; *Weems v. Weems*, 19 Md. 334; *Waters v. Waters*, 35 Md. 531; *Berry Will case*, the witness was correctly allowed to answer this question. As we said above, the only contention made over the prayers is that over the seventh of the caveatees, and we set it out in full here:

"The Court instructs the jury that the influence which will avoid the will offered in evidence in this case must have been exerted on Josephine Wagner, Sr., deceased, the testatrix, to such a degree as to have amounted to force and coercion, destroying her free agency, or by importunities which could not be resisted, so that the same was equal to force or fear;

"2. That neither the influence of affection or attachment for the caveatees (Mrs. Louisa Becker and Mrs. Katie Klein) or either of them, or the mere desire to gratify the wish of them or either of them, would vitiate the will; for that would be a very strong argument in favor of the will;

"3. That the burden of proof is upon the caveator (Miss Josephine Wagner, Jr.,) to show not only that influence tantamount to force (so actually destroying free agency) existed, but that it was exercised for the purpose of procuring the execution of the will offered in evidence, and that the same was obtained by means of undue influence so exercised;

"4. And that the verdict of the jury must be for the said caveatees (Mrs. Louisa Becker and Mrs. Katie Klein) upon the third issue, and the answer of the jury thereto must be 'No,' unless they find by a preponderance of the evidence, that such influence was exerted upon Josephine Wagner, deceased, to such a degree as to have amounted to force and coercion destroying her free agency in relation to the making of her will."

We do not intend to enter into any prolonged discussion of this prayer, for the principles of law set out there have been too long and too recently recognized by the decisions of this Court to admit of any question as to their correctness. It is an almost exact reproduction, so far as the language is involved, of instructions granted and approved in *Higgins v. Carlton*, 28 Md. 115 and *Laymen v. Conrey*, 60 Md. 286; and of an instruction in the recent case of *Dudderar v. Dudderar*, 116 Md. 605, which was refused by the trial Court, but on appeal, this Court held error had been committed by its rejection. So we consider it needless to debate again a ruling so well fortified, unless, of course, we had doubts as to its correctness, which, however, we have not. The form of the prayer, however, we think is open to criticism. We do not think it is entirely proper to arrange a prayer of this character into separately numbered paragraphs. The principles announced would probably have been more readily understood by the average juror or layman if arranged in the usual and ordinary manner. Although, we do not deem it of sufficient moment in the present case to justify a reversal, we, nevertheless, do not want to be understood as in any manner giving it our approval.

The rulings of the Court below will accordingly be affirmed.

Rulings affirmed.

Md.]

Syllabus.

RICHARD H. PLEASANTS

*vs.*WILLIAM B. WILSON AND MELVILLE WILSON,
TRUSTEES.*Trustees: power to impose restrictions on trust property.*

By an item of his will, a testator conferred upon the trustees, during the life of the *cestui que trust*, the following powers, to wit: In their discretion from time to time to change the investment of the trust estate and to reinvest the same in other good securities, including ground rents, and a part of it they might invest in real estate if more desirable, and in case of any sale by the said trustees, the purchasers not to be bound to look to the application of the purchase money. The trustees conveyed a certain tract of real estate comprising a part of the corpus of the trust estate to the Title Guarantee & Trust Company, and in the deed imposed restrictions upon the use and development of the property in keeping with the high-class improvements in the neighborhood; the Title Company sold and conveyed certain of the lots to R. H. Pleasants and others, and reconveyed the balance of the tract to the trustees, all the conveyances having the same character of restrictions; as a result of the restrictions the lots sold for a much higher price; the purchaser of one of the lots objected to the consummation of the sale, on the ground that, while the trustees had the right to impose restrictions on the lots actually sold by them, they had no right to impose any restrictions on the balance of the real estate retained by them; upon an appeal from an order of a court of equity, decreeing specific performance, it was *held*, that the

trustees had full power to sell the real estate held by them, in trust, and to reinvest it in other real estate "if more desirable," and they could therefore sell and reinvest in *restricted* real estate. pp. 344-345

Decided February 10th, 1915.

Appeal from the Circuit Court for Baltimore County. In Equity. (DUNCAN, J.).

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Richard H. Pleasants, in propria persona, for the appellant.

Joseph Packard, for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court for Baltimore County directing the specific performance of a contract for the sale of a lot of ground containing two and 2/100 acres of land, being a part of a tract of seventeen acres, described as situate on the north side of Cold Spring Lane in Baltimore County, between the York Road and Charles Street Avenue and bounded on the south by the Guilford development of the Roland Park Company and on the east and west by the Garrett properties.

The bill is filed by the plaintiffs as trustees under the will of David S. Wilson, late of Baltimore County, deceased, against the appellant, the purchaser of the lot in question, under a contract of sale, dated the 1st day of June, 1914, between the parties.

It will be seen by an examination of the contract, that it was agreed between them that not only the lot sold the defend-

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ant, but the entire tract of seventeen acres, should "for the mutual benefit of all the parties be made subject to certain covenants and restrictions," and these restrictions as set out in the contract upon the payment of the purchase money were to be included in the deed from the trustees to the purchaser.

It is contended upon the part of the appellant, the defendant below, as set out in his answer to the bill, that the trustees have no power under the terms of Mr. Wilson's will to impose restrictions upon the unsold property reserved by them and unless they can impose all of the restrictions named in the contract of sale, not only upon the property which they have contracted to convey to him, but also upon the remaining property reserved by them, then, they are not in a position to carry out their contract with him, and cannot convey the lot, under the terms and restrictions set out in the contract, they are here seeking to enforce.

It is conceded, however, on the part of the appellant that the trustees have a power of sale and that they may even impose restrictions upon real estate actually sold and transferred, but it is denied that they can incumber with restrictions any unsold land remaining in their hands, because the residuary devisees have a right to the same, at the termination of the life estate, in the same unencumbered condition in which they, the trustees, acquired it, under the Wilson will.

The single question presented for our decision is, whether the trustees, the appellees here, have the power and authority under the will of the testator, to impose the restrictions agreed upon in the contract of sale, on the remaining unsold property held by the trustees and this will depend upon the construction of the power conferred by the will itself, and the intent of the donor of the power, as to the mode in which the power must be executed.

The testator died in the year 1882, leaving a large estate, consisting of both real and personal property. The will and codicil were duly admitted to probate, in the office of the

Register of Wills of Baltimore County and the executors named in the will qualified thereunder.

By the will, the testator among other things, devised to his two sons, James G. Wilson and William B. Wilson, in their own right, and to them, and one Thomas J. Wilson, as trustee for his daughter, Mary B. Wilson, during her life, a certain portion of his residence in Baltimore County, called "Kernewood," to be held by his sons and the three trustees as tenants in common.

It is admitted by the answer to the bill that the seventeen acres, to be affected by the restrictions, set out in the contract of sale, is a part of the country residence, called Kernewood, and is also a part of the trust estate, properly held by them in trust for Mary B. Wilson, the daughter, subject to the limitations and powers of the will.

It is further admitted that the daughter of the testator, the beneficiary under the trust imposed by the will is living and that the trustees by deed dated June 20th, 1914, conveyed the seventeen acre tract to the Title Guarantee and Trust Company of Baltimore subject to the restrictions referred to in the contract of sale, and the company, in turn, re-conveyed the property to the trustees subject to and containing the same restrictions and division.

By the second item of the will, the testator conferred upon the trustees the power and authority over the trust estate as follows: And I hereby authorize my trustees aforesaid or a majority of them (whom I authorize and empower to act and bind the trust in all matters), in their discretion from time to time to change the investment of the trust estate, and to reinvest the same in other good securities, including ground rents, and a part of it they may invest in real estate if more advisable, and in case of any sales by my said trustees I hereby direct that the purchaser shall not be bound to see to the application of the purchase money. In case of the death of any one of the trustees during the continuance of the trust, the survivors shall have all the powers of the original trustees,

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but upon the death of two of said trustees the surviving trustee or his successors shall appoint a new trustee, who, with him, shall have all the powers of the original, including the power to appoint other trustees, so that the number of at least two trustees shall be kept up until the termination of the trust.

By the third item of the will the testator gives to his daughter, Mary B. Wilson, "the power by any testamentary paper to devise and bequeath any part of the real and personal estate, as the same may be held, in trust for her, at the time of her death not exceeding one-half in value of the estate, to and among any sons and their wives and descendants, and in such manner and proportions as she may think proper, or if she shall so desire, she may devise and bequeath one-third of the half to such charitable and religious associations or corporations as she may prefer, and the entire remainder of the trust estate, including such portion of the half past as may not be devised and bequeathed by her as aforesaid. I devise and bequeath at her death to my sons, James G. Wilson and William B. Wilson, equally and absolutely, and to the descendants of either or both of them, if either or both shall die before her, such descendants to take per stirpes and not per capita, the shares to which its or their parent or parents, would if living, be entitled to."

By the fifth paragraph of the bill it is alleged, and sustained by proof, that the tract as now held by the trustees is surrounded by an unusually high class of improvements, being located on the edge of the city and bordering upon Roland Park, which is subject to restrictions in the interest of high-class developments. That in order to develop this tract to the best advantage they have extended a concrete road and asphalt sidewalks northerly from Cold Spring Lane, upon which it binds, through the center of the tract so as to divide it into attractive and high-class building lots, and have also contracted with public utility corporations to construct water and gas mains through the tract.

It is admitted that the seventeen-acre lot has heretofore been unproductive, and not saleable to advantage, as held by the trustees, but by reason of its surroundings and location, it could be sold for a better price, if it was divided into building lots and made subject to the restrictions imposed by the deed here in question.

Mr. White, who has been engaged in the real estate business for twenty-five years, who knows the lot and its surroundings and who has had experience in dealing with suburban property in this locality, testified that he knew the property very well; it is situated on the north side of Cold Spring Lane between the York Road and Charles Street Avenue, and bounded on the south by the Roland Park Company's development, Guilford, which is a highly restricted property, bounded on the east by John W. Garrett's property, on the north by the property of Mrs. T. Harrison Garrett, on the west by the handsome and expensive property of H. W. Garrett; the land lies beautifully for high-class development; part of it is cleared, a larger part of it is covered by magnificent forest trees. He further testified that he was thoroughly conversant with the agreement as to the restrictions on the property. now in question, and as to those in the deed from the trustees to the Title and Trust Company. And in answer to the following questions, said:

"Q. Having regard to the character of the 17 acres referred to in this deed and these proceedings, what is your opinion as to the best way for the trustees who hold title to said property, to dispose of it, so as to bring the largest returns for the beneficiaries of the trust estate?

"A. By selling it subject to the conditions and restrictions imposed by the papers already executed and referred to in my last answer. Several months ago when I was employed by the trustees to sell this property I was very much opposed to placing any restrictions upon the property. Since then I have become convinced that that is the only way to sell it and get the best prices for it.

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"Q. What is your opinion as to the effect upon the salability of these 17 acres, which is brought about by the subdivisions into lots and the opening of the road shown on the plat annexed to the deed from the plaintiffs herein to the Title Guarantee and Trusts Company?

"A. I think it absolutely essential and necessary for the salability to have the concrete road laid down as provided for, the gas and water to be continued through the property as also provided for. Without these things it would be almost impossible to sell the property. As a whole the property would not sell for anything like as much as it will sell for with these improvements mentioned, after allowing for the cost of same. The shape of this property is rectangular with a greater depth northerly from Cold Spring Lane than its frontage on Cold Spring Lane. A road runs northerly from Cold Spring Lane for between 600 and 700 feet through approximately the center of this property, thus dividing it into lots suitable and most desirable for building purposes. Water or gas pipes have been or are now being laid in the bed of this road and the road is now being concreted at a great cost to the trustees. It is difficult and in fact so far as my experience has shown me impossible to sell any of the lots of this property without a guarantee that such restrictions as are imposed in the agreement are imposed on all of the lots. Each prospective purchaser inquires as to what guarantee he will have that his lot is not likely to be damaged by poor improvements on the part of his neighbor or the exercise of too much freedom as to the management of the next property. The two lots the sale of which I have already negotiated, could not have been sold unless the agreement that the road would be built and the restrictions created."

Mr. Wm. Bowley Wilson, one of the trustees, testified that he had heard Mr. White's testimony and fully agreed with the statements made by him and thought his conclusions were absolutely correct in regard to the sale of the seventeen acres. He further testified that the trustees never had an offer for

the property as a whole, which would realize for the trust estate as much as they can produce by selling it in lots subject to the restrictions contained in the agreement. "The offers we received were much lower than we thought the property was worth, and amount to much less than we will receive if we sell lots under the present arrangement after deducting all the expense which we are required to make, and I do not think I would be doing my duty to the estate to sell it in any other way."

Upon this testimony, we think, it is clear that the trustees adopted the best mode of offering this property for sale, by selling it in building lots and not as an entire tract.

In *Hopper v. Hopper*, 79 Md. 402, it is said, it was the duty of the trustees to offer the property in such a manner as to bring its fair market value and to exercise the same judgment and prudence that a careful owner would exercise in the sale of his own property. Whether it is advisable to sell land by the acre or in building lots depends largely upon the location of the property and the surrounding circumstances. *Johnson v. Hambleton*, 52 Md. 378; *Thomas v. Fewster*, 95 Md. 450; *Hubbard v. Jarrell*, 23 Md. 84.

We come now to the question of the authority and power of the trustees under the will, to impose the restrictions set out in the contract upon the remaining unsold real estate held under the trust.

It is conceded that the trustees have a power of sale, but it is denied that they can encumber the remaining real estate with such easements as they have done in this case.

Looking to the grant of power under this will, to these trustees, it seems to us it is entirely sufficient to authorize and empower them to sell this unrestricted property and to reinvest it in restricted real estate, for the benefit of the trust estate. The language of the power is, "I hereby authorize my trustees or a majority (whom I authorize and empower to act and bind the trust in all matters) in their discretion, from time to time, to change the investment of the trust

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estate, and to reinvest the same in other good securities, including ground rents, and a part of it they may invest in real estate if more advisable, and in the case of any sales by my said trustees I hereby direct that the purchaser shall not be bound to see to the application of the purchase money."

It will be thus seen that the trustees have full and ample power to sell the real estate held by them in trust and to reinvest it in other real estate, "if more desirable," and this being so, they have the power to sell the real estate as was done in this case, and to reinvest it in restricted real estate. In other words, such a sale would be but a reinvestment or a change of investment, as contemplated by the testator, under the power granted in the will. *Collins v. MacTavish*. 63 Md. 168; *Stump v. Warfield*, 104 Md. 530.

The law as to the effect of such restrictive covenants in deeds conveying real estate has been fully discussed and treated of by this Court in numerous cases on the subject. *Dawson v. W. Md. R. R. Co.*, 107 Md. 70; *Russell v. Zimmerman*, 121 Md. 340; *Wood v. Stehrer*, 119 Md. 148; *Sullens v. Finney*, 123 Md. 653; *Linthicum v. W., B. & A. Electric Co.*, 124 Md. 263.

In the recent case of *Lowes v. Carter*, 124 Md. 678, JUDGE URNER in a very carefully prepared opinion, fully reviews the previous decisions on this subject, and they need not be further discussed, or set out in this opinion.

In conclusion, we hold that the trustees under Mr. Wilson's will had the power to impose the restrictions and to create the easements set out in the contract of sale, for the benefit of the trust estate, in order to make an advantageous sale thereof, and as the title to the tract purchased by the appellant is free from the objections urged against it the decree of the lower Court, so declaring, will be affirmed.

Decree affirmed, with costs.

THE TAXICAB COMPANY OF BALTIMORE CITY

vs.

LESTER H. EMANUEL, THROUGH HIS FATHER AND
NEXT FRIEND SOLOMON H. EMANUEL.*Removals: right of—; joint defendants; all must petition. Actions for damages through negligence; what must be proved.**Automobiles: excessive speed; contributory negligence.**Prayers: taking case from jury; "no evidence."**Injuries subsequent to accident.*

To entitle a plaintiff to recover in a suit for damages because of injuries received through the alleged negligence of the defendant, there must be some act of negligence, either of commission or omission, on the part of the defendant or its servant, and evidence that such negligence was the cause of such injury, and the burden of proof is on the plaintiff. p. 256

In an action for damages for injuries alleged to have been received by the plaintiff, by being hit by the defendant's automobile, evidence that the automobile was going at an excessive speed, is evidence legally sufficient to submit to the jury in determining the question of negligence. p. 259

A prayer, seeking to take a case from the jury for the want of legally sufficient evidence, should not be granted, if there is any evidence, however slight, that is competent, pertinent, and coming from a legal source, and tending to prove the plaintiff's case. p. 259

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But the weight and value of such evidence are for the jury to determine. p. 259

To establish contributory negligence, as a matter of law, the act relied on must be distinct, prominent and decisive, and one about which ordinary minds would not differ. p. 259

Where the nature and attributes of the act relied on to show contributory negligence can only be correctly determined by considering all the attending circumstances, it is for the jury, and not for the Court to pass upon and characterize it.

pp. 259-260

It does not follow that because a plaintiff, in a suit for damages for injuries received from an automobile, could have avoided the accident, that he is guilty of contributory negligence; in such a case, to make him guilty of contributory negligence, it must be shown that he knew of the car's approach in time, or by the use of reasonable diligence *should* have known *it in time*, to have avoided the accident. p. 262

In an action for damages for injuries received, if there is evidence that additional injuries were occasioned afterwards by the treatment the plaintiff received in the hospital to which he went, and that the plaintiff might have avoided such additional injuries by the use of ordinary care, he is not entitled to recover for such additional injuries. p. 262

The term "party," as used in the Constitution, Article 4, section 8, and in the Act of 1868, Chapter 180, regarding the right of removal in civil cases, must be taken collectively, where there are more persons than one, as plaintiffs or defendants, and such application must be made in behalf of all the persons constituting the party plaintiffs or party defendants; the right does not reside in each of the plaintiffs or defendants. p. 265

After the jury has been sworn it is too late to exercise the right of removal. p. 265

Decided February 17th, 1915.

Appeal from the Baltimore City Court. (SOPER, C. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Albert C. Ritchie and Robinson Griswold (with whom were *Stuart S. Janney* and *W. Howard Hamilton* on the brief), for the appellant.

Michael P. Kehoe and James J. Lindsay, for the appellee.

PATTISON, J., delivered the opinion of the Court.

In this case an infant, Lester H. Emanuel, recovered a judgment against the defendant, The Taxicab Company of Baltimore City, in the Court below, for personal injuries suffered by him, alleged to have been sustained by the carelessness and negligence of the defendant's agent in operating an automobile belonging to the defendant, on the 12th day of September, 1913, upon Greenmount avenue, or York road, near Windermere avenue, or Thirty-fourth street, in the City of Baltimore.

There are in the record three bills of exceptions, two to the rulings of the Court upon the admission of testimony, these however, are waived, and one to the ruling of the Court upon the prayers. In addition to this exception, we are asked to review the ruling of the Court in refusing to grant the defendant's application for a removal of the case.

Among the prayers offered by the defendant were three that asked for a verdict for the defendant; the first and third because of a want of legally sufficient evidence entitling the plaintiff to recover, and the second because of the alleged negligence of the plaintiff directly contributing to the accident complained of. We will first consider the ruling of the

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Court in refusing to grant these prayers, and to do so it will be necessary for us to state fully the testimony in the case.

The street upon which the accident happened is named in the declaration as Greenmount avenue, although it is generally spoken of in the testimony as York road. It runs north and south and upon it are the tracks of the City Passenger Railway Company. The width of said street is thirty-nine feet and seven inches between the curbs; the distance between the curb on each side of the street and the tracks of the railway company is twelve feet and two inches, with a distance of four feet and five inches between the tracks. Windermere avenue, thirty-two feet in width between its curbs, intersects York road from the east, but does not cross it. Calvin avenue intersects York road from the west, the southern line of which is about one hundred and ten feet north of Windermere avenue. About ten feet north of what would be the north line of Windermere avenue, if it were extended beyond York road, is an alley, ten feet in width, intersecting York road from the west, but not extending beyond it. Ethelwood lane, the next street above Calvin avenue, is three hundred and seventy-six feet north of Windermere avenue. The streets south of Windermere avenue are Henderson and Thirty-third streets, the former about one hundred and fifty feet and the latter about three hundred and ninety feet from said avenue.

The plaintiff, an infant sixteen years of age at the time of the accident, residing with his father on the north side of Calvin avenue, was injured while attempting to cross in a northwestern direction from the east side of York road, at a point near the middle of Windermere avenue, to the west side of said road at a point where it is intersected by the afore-said alley.

The automobile of the defendant, at such time, was coming south on the west side of York road—its lights were not burning, nor were the street lamps lighted at the time.

The plaintiff testified that he, on the evening of the accident

took a street car at Holliday and Fayette streets for his home on Calvin avenue; that when the car reached Twenty-fifth street he noticed, by the clock in front of the drug store, that it was quarter of seven, and that he had frequently observed that it took five minutes for the car to go from this point to Calvin avenue, and thus he fixed the time of his reaching Windermere avenue at ten minutes of seven, and he says it was then cloudy and getting dark; that he alighted from the front step of the car at a point about the middle of Windermere avenue and remained at this point until the car reached a point, where he saw it, a block away, between Calvin avenue and Ethelwood lane; that he looked twice up Windermere avenue and twice up and down York road before starting to cross the last-named street, and saw nothing coming, and "before he got across to the other curb the automobile struck him;" that when struck he was in the act of stepping from the south-bound track; that he did not see the automobile at all before it struck him; that Mr. Hull, the driver of the automobile, came back and put him in the automobile and took him to the Hebrew Hospital. Upon cross-examination he testified that while crossing the street he again looked up York road, but saw no automobile or other vehicle, except the street car, and that had there been any he would have seen it, as there was nothing to obstruct his view; that he had no difficulty in seeing the street car between Calvin avenue and Ethelwood lane.

William D. Burnite, a witness for the plaintiff, testified that he lived on the south side of Windermere avenue seventy-five or eighty feet east of York road; that he saw the boy start across the street, facing towards the alley, "and the automobile come down and hit him;" that it was in the evening about seven o'clock and was cloudy and getting dark, he at the time was seated on his porch; that the boy started across the street and was nearly over, just crossing the south-bound track, when the automobile struck him; that when he started across the street, the car was out of sight; that he

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did not hear any gong rung or horn blown preceding the accident; that "he could not say how fast the automobile was going, but they went about two hundred feet after the fellow put the brakes on; that he could tell when they put the brakes on by the way the automobile started to screech; that he heard this screeching about the same time the automobile struck the boy; that the accident happened about a minute or a little over, after the boy got off the car; that he first saw the automobile when it hit the boy, or rather about two seconds before it hit him, right at the time it hit him; that he did not see the automobile approaching and simply saw the contact, the accident, it was going pretty fast, he could not say how fast."

Robert Woods, produced by the plaintiff, testified that at the time of the accident he was standing on the York road in front of Mr. Lacey's feed store, near the north corner of Henderson street; that he saw the plaintiff get off of the car and after the car had passed some distance up the street, saw him start across the street "kind of on a bias, with his face towards the alley;" that it was cloudy and getting dark; "that at the time the boy started to cross the street he did not see any street cars or carriages or automobiles on York road; that the boy was on the south-bound track going across when the automobile struck him; *that when he first saw the automobile it was up by Calvin avenue and the boy was, he guessed, about middle way of the street; that the automobile was coming real fast*; that he thought the boy could get across before it hit him; that the left side of the automobile hit the boy, and that after it struck him it went on down in front of Gunning's store at the south side of Henderson street." That he had no difficulty in seeing the automobile at Calvin avenue, as there were no other vehicles on the streets and that there was nothing between the plaintiff and the automobile to prevent him, while crossing the street, from seeing it.

Frank Blair, when called by the plaintiff, testified that he was at the time of the accident on York road, in front of

Windermere avenue, that when the car was between Calvin avenue and Ethelwood lane the plaintiff started to cross the track, and was between the two tracks when the automobile struck him; that the automobile was coming towards the city, and it was the front of the automobile that struck him; it then came down as far as Henderson street and stopped; that he "didn't hear any horn blown or noise of any kind."

Benjamin Williams, plaintiff's witness, testified that he was at the time of the accident with Blair in front of Windermere avenue on the west side of York road; that after the car from which the boy had alighted passed he saw him standing on Windermere avenue, about middle way of said avenue, back from the track about five feet, and when he started to cross, the car was about Calvin avenue, somewhere near Ethelwood lane; that "the boy was walking at a pretty good gait, he seemed like he was in a hurry going home," that it was getting dark; that he saw the machine when it passed Calvin avenue, he saw it on account of the lights in the store; that then he never paid much attention to it, didn't know whether the machine had stopped; that in that time the boy started to cross the street, and when the machine was about two feet from him he heard somebody holler, "Hey, look out;" the boy was then coming across the street, and he kind of turned like that (indicating), and just as he turned to get out of the way the machine struck him and knocked him over; that the left-hand side of the machine struck the boy; "that he heard no noise or anything until he heard this shout; that the boy was walking across the street kind of catercornered. toward home;" that he was only about eight feet from the boy when the accident happened; that at the time the boy started to cross he, the witness, "didn't see any street cars or buggies or wagons or automobiles either coming up or going down; that after he saw the car pass the store he did not see any more then until the automobile struck the boy;" that when he saw the automobile it was "right at the corner of Calvin avenue, that it could not have come out

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of Calvin avenue because I seen it when it was passing the store," which was above Calvin avenue. Upon cross-examination he testified that he could not say whether the lights were burning in the car; that he did not have any trouble seeing the automobile when it passed the store above Calvin avenue.

Eva Emanuel, sister of the plaintiff, who was at the time fourteen years of age, testified that she was between Gorsuch avenue and Thirty-third street when her brother passed her in the car, and she walked up a little faster to meet him when he got off; she saw the car stop at Windermere avenue, as it had its lights burning; she was then at the drug store at the northwest corner of Thirty-third street and York road; she had no difficulty in seeing this distance; she saw her brother after the car had passed standing on the east side of the street, at that time she was almost to Gunning's; that he, after looking carefully to see if any vehicles were coming, started across the street, and the next thing she saw, he was knocked down; that she did not even see the machine coming and saw it just as it knocked him down; that she was then between Lacey's and Gunning's.

Fred G. Kitchen, who was at the time of the accident an employee of the defendant company, but not in its service at the time of the trial, testified that on the night of the accident he had a conversation with Eva Emanuel at the company's garage; that he asked the little girl if she had seen the accident, and she said she had, that she saw her brother get off the street car and run behind it to get across the street; that she yelled to him and he stopped, and if he had stayed still the car would not have struck him, but he started a second time and the car struck him and knocked him down. This conversation to which he testified, however, was denied by Eva Emanuel when upon the stand. This witness was a defendant to the suit, but at the conclusion of the case a prayer was granted taking the case from the jury so far as he was concerned.

George E. Hull, called to the stand by the defendant, testified that he was in the employ of the defendant taxicab company on September 12th, 1913, and was at the time of the accident driving the automobile of the defendant, that he turned into Greenmount avenue from Holman avenue; "that Holman avenue is at least a mile north of Ethelwood lane, and he came straight on down the York road; that as he approached Windermere avenue he saw a street car coming north; that the first he saw of Lester Emanuel was when he came from behind the car, which had started, and he was on his way across the street; that he did not see him get off the car; that it was then between six and seven o'clock, and you could tell the evening had started; that he did not have any trouble in distinguishing any objects within a reasonable range any more than you would in the day time, except you have a condition that is between daylight and dark; that when Lester Emanuel came from behind the car, the car had started off, and the front of the automobile did not vary five feet from where the motorman stands on the north-bound car; that the front platform of the car was then nearer to the northern boundary of Windermere avenue than to the southern boundary; that he would not say he was directly abreast of the motorman, it was hard to state exactly, as he remembered coming to the car and seeing the boy just about the same time; that the front wheels of the automobile were at the front or near the front of the car; that at that time Lester Emanuel came from behind the car and started across the street; that he did not go across on a straight line, but in a direction generally west by north, "and as he came from behind the car and when he was first seen by the witness, he hollered to him and "at the same time he, the witness, reached over, threw out his clutch, and reached down to throw out his gear, and throw on his brake;" that the boy then stopped between the north and south-bound tracks, and seeing this "he relaxed and let in his clutch and left his gear alone and kept on ahead;" that "when the boy stopped

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he thought that was a signal for him to go on, that he had the right of way; that after the boy started up again, after stopping, he, the boy, hurried across, that is, he tried to get across; it was then that he was struck." He was then asked "after he left his position between the tracks and started hurriedly across the street, could you have avoided the accident? A. No, sir." That "the boy was hit by the left side of the front of the car; that the boy ran into the car, the car did not run into him; that after Emanuel ran into the automobile he could not place exactly where the car stopped, but it stopped without damage, as he took the time to throw off the gear and stop with his foot brake, he turned on his emergency brake and held the car from moving; that he did not put on his emergency brake before he stopped because he did not realize the boy was going to be struck; that he first knew the boy had run into the car when he heard the crash;" that after the accident he got out of his car and went back and found the boy's leg broken and he took him and put him in the automobile, and upon the suggestion of his little sister, took him to the Hebrew Hospital. Upon cross-examination he testified that he had not lighted the lamps on his machine before the accident; that he lighted them afterwards at Gorsuch avenue, five or six blocks away; that "he was coming down right on the right-hand side of the road, on the side that is provided for vehicles; that he was not running on the car tracks, but was on the west side of the car tracks; that the distance from the most eastern side of the automobile to the most western rail of the western track was about that much (indicating approximately three feet, six inches); that when he first saw the boy he was in motion, walking, and after the boy stopped and they started on again, he had a hurried gait, a gait one would assume in getting across in front of a moving vehicle; that he could not say what the speed of the machine was, but was an average city or suburban speed with a clear road."

Valentine Wyroba, produced by the defendant, testified that he also worked for the defendant company and was in

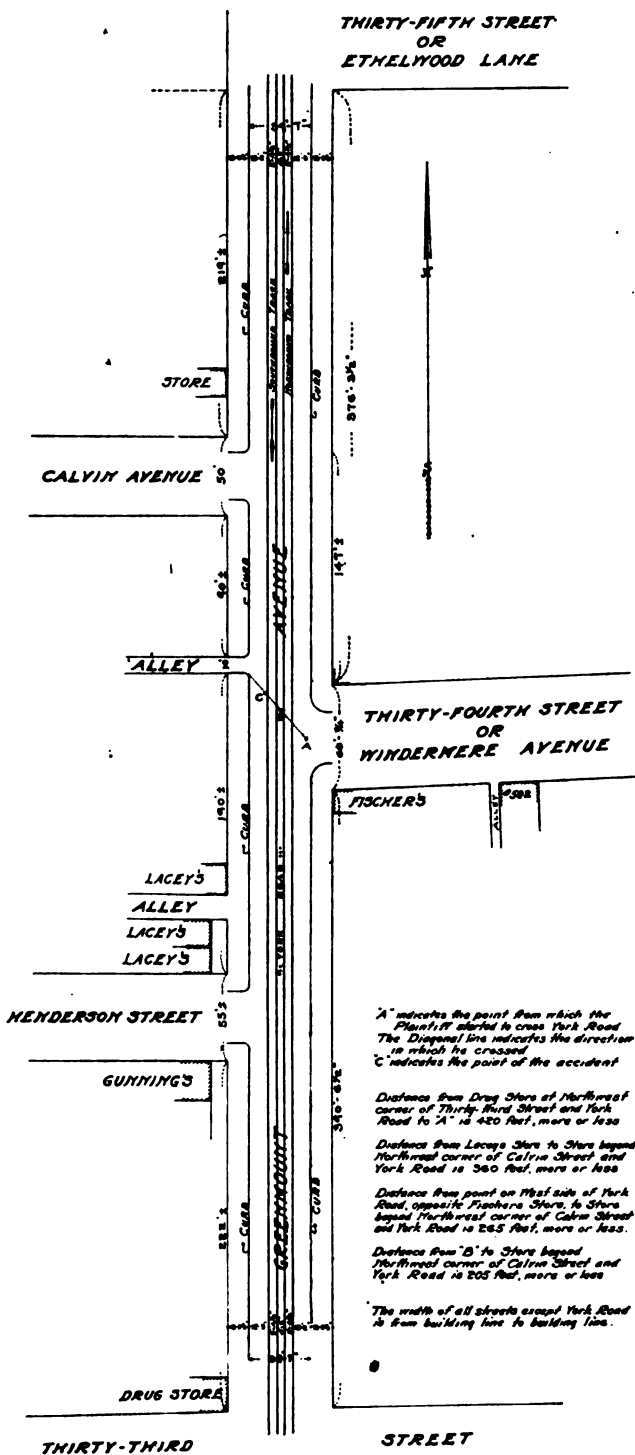
the automobile with the witness Hull; that when he first saw the boy he was coming from behind the car, about ten feet from the automobile; that he was going across the street, and both he and Hull hollered to him and he stopped and then went on again and then they struck him; that the street car passed them a couple of seconds before the automobile struck the boy; that the automobile was going about 10 miles an hour.

To entitle the plaintiff to recover there must be some act of negligence, either of commission or omission, on the part of the defendant or its servant, and it is necessary that there be some evidence indicative of negligence in the circumstances surrounding the occurrence, either antecedent to, or coincident with the happening of the accident, and the burden is upon the plaintiff to show such negligence. *Havermale v. Houch*, 122 Md. 87; *Schier v. Wehner*, 116 Md. 554.

In our opinion there is found in the facts stated evidence legally sufficient to be submitted to the jury tending to show negligence on the part of the defendant in operating its automobile at an excessive rate of speed.

The witness Woods in his testimony stated that the boy was on the south bound track going across when the automobile struck him; that when he first saw the automobile it was up by Calvin avenue and the boy was then, he thought, about the middle way of the street; that he thought the boy had time to get across, but the automobile was coming real fast.

The point at which the boy started to cross the street was about midway between the north and south curbs of Windermere avenue, and near the east curb line of York road, and the course he took in crossing the street was in the direction of the alley aboved referred to, only about ten feet above the north line of Windermere avenue if it were extended across York road. The entire distance he was to go would not exceed sixty feet, as shown by the survey and plat made and furnished by the defendant, which the reporter is asked to insert in the report of this case. If the plaintiff was in the



"A" indicates the point from which the Plaintiff started to cross York Road. The Diagonal line indicates the direction in which he crossed. "C" indicates the point of the accident.

Distance from Drug Store at Northwest corner of Thirty-Fifth Street and York Road to "A" is 420 feet, more or less.

Distance from Lacey's Store to Store beyond Northwest corner of Calvin Street and York Road is 360 feet, more or less.

Distance from point on West side of York Road, opposite Fischer's Store, to Store beyond Northwest corner of Calvin Street and York Road is 285 feet, more or less.

Distance from "B" to Store beyond Northwest corner of Calvin Street and York Road is 205 feet, more or less.

The width of all streets except York Road is from building line to building line.

middle of York road, as stated by the witness, he was between the north and south bound tracks of the railway company, at the point B. on the plat, only about twelve feet from the place of the accident, when, as the witness Woods says, the automobile was at Calvin avenue. If it was at the center of the avenue it was at least one hundred and forty feet from the place of the accident, or if the witness saw it at the store at or near the north corner of Calvin avenue, where it was first seen by the witness Williams, it was one hundred and ninety-five feet from the place of the accident.

The statute, sec. 144, Art. 56 of the Code, provides that "if the rate of speed of a motor vehicle operated upon the highways of this State exceeds twelve miles an hour in the thickly settled or business part of cities, town or villages, or eighteen miles an hour in the outlying or not thickly settled parts of cities, towns, or villages, such rate of speed shall be *prima facie* evidence that the party operating such vehicle is operating the same at a rate of speed greater than is reasonable and proper, and in violation of the provisions of this section, and the burden of proof shall be upon him to show that such rate of speed was not greater than was reasonable and proper, as above set forth."

If the automobile was at the middle of Calvin avenue and was going eighteen miles an hour, it would take about six seconds to reach the place of the accident, and if it was at said store, it would have taken about seven and one-half seconds to have reached the place of the accident. Williams stated that "the boy was walking at a pretty good gait, he seemed like he was in a hurry going home." At an ordinary gait it should not have taken the plaintiff so long as six seconds to have walked the twelve feet, the point at which the automobile struck him, and certainly not so long if his gait was a hurried one, as described by Williams. Therefore, it would seem that the automobile ran at a greater speed than eighteen miles an hour in reaching the point of the accident at the time that it did.

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We have also the evidence of Williams who stated that at the time the boy started to cross he, the witness, did not see any street cars or buggies or wagons or automobiles. How far the boy had advanced in crossing the street at the time he saw the automobile he does not say, but at the time he saw it it was at least one hundred and ninety-five feet from the place of the accident, and the boy was on his way across.

We think this evidence, together with the evidence of Burnite as to the speed of the car, was legally sufficient to go to the jury tending to show an excessive rate of speed at which the automobile was running.

A prayer seeking to take a case from the jury for the want of legally sufficient evidence will not be granted, if there is any evidence, however slight, legally sufficient as tending to prove it, that is to say, competent, pertinent and coming from a legal source, but the weight and value of such evidence will be left to the jury. *Poe's Practice*, p. 317, sec. 295; *Moyer v. Justis*, 112 Md. 220; *M'Elderry v. Flannagan*, 1 H. & G. 308; *Leopard v. Ches. & Ohio Canal Co.*, 1 G. 222; *Jones v. Jones*, 45 Md. 154; *Mallette v. British Ass. Co.*, 91 Md. 481.

We are now to consider the defendant's second prayer by which the Court was asked to instruct the jury "that from the uncontradicted evidence in this case the plaintiff was guilty of negligence directly contributing to the act complained of, and therefore their verdict must be for the defendant."

In considering this prayer we must inquire whether the facts justify the Court in holding as a matter of law that a recovery cannot be had because the plaintiff was guilty of contributory negligence. The truth of the evidence adduced by the plaintiff must be assumed in dealing with this question and all legitimate inference deducible from that evidence must be conceded.

The act relied on to establish as a matter of law the existence of contributory negligence must be distinct, prominent and decisive, and one about which ordinary minds would not differ in declaring it to be negligent. Where the nature and

attributes of an act relied on to show negligence contributing to an injury sustained can only be determined correctly by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the Court to determine its quality as matter of law. *B. & O. R. R. Co. v. Hendricks*, 104 Md. 84; *Cooke v. Traction Co.*, 80 Md. 558, and cases cited in the opinion in the latter case.

The plaintiff testified that before crossing he looked both up and down the street and again looked while crossing the street, but did not see any vehicle upon the street and did not see the automobile until after it struck him.

It is urged by the defendant that he did not look as he says he did, for had he done so he could have seen the automobile and have avoided the accident, as there were no obstructions upon the street to prevent him from seeing it.

It will be borne in mind that a number of witnesses stated that it was cloudy and growing dark at the time of the accident. It was also stated in evidence that at this time the lights in the street car were burning, as well as those in some of the stores upon York road. It was by reason of the lights in the store above Calvin avenue that Williams first saw the automobile in front of said store, and he never saw it again until about the time it struck the boy. These facts in themselves corroborate the testimony of those witnesses who stated that it was growing dark. It is true the plaintiff stated that he saw the street car a block or more away before attempting to cross the street, but it will be remembered that this car was lighted, and for that reason it could have been much more easily seen than an object that distance away not lighted, and it is a conceded fact that the automobile was of a dark color and that its lights were not burning.

The sister of the plaintiff, while at or near Gunning's, and Burnite, while upon his porch on the south side of Windermere avenue seventy-five feet east of York road, saw the plaintiff after he had alighted from the car and as he started on his way across the street, but the condition as to light at

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this point, which was near the store of Fischer, on the corner of Windermere avenue, may have been very different from the conditions at other points on York road between Calvin avenue and Windermere avenue. It is not said whether the lights in Fischer's store were or were not burning at that time. If they were, they would have shone upon the plaintiff, enabling his sister and Burnite to have seen him as they stated.

The sister, like the plaintiff, never saw the automobile until it struck him, and Williams, it seems, saw the automobile only as it was passing Calvin avenue where the lights shined out upon it; he never saw it again until about the time it struck the boy. This is true of all others who saw it; that is, they saw it first at Calvin avenue and never saw it again until about the time it struck the boy. Woods says when he first saw it at Calvin avenue, the plaintiff was then in about the middle of the street, and therefore had he, the plaintiff, looked up the street before such time he probably would not have seen the automobile; and thus it may be that he looked up the street before crossing it and then again while crossing it, but before he reached the middle of the street. It may have been that just at the time the automobile passed the store at Calvin avenue, where he could have seen it, or at least where the other witnesses saw it, he was not looking in that direction, and we cannot say that because he was not at all times, while crossing the street, looking in such direction, when it was equally as important for him to look in the opposite direction, that he was guilty of contributory negligence. If he looked, as he said he did, before starting to cross the street, he would not have seen the automobile, if Williams is to be believed, for Williams says at that time the automobile was not in sight.

We can not say from the testimony in this case that the plaintiff was, as a matter of law, guilty of contributory negligence. The question of contributory negligence should have been left to the jury upon the testimony adduced.

The defendant's fourth prayer was, in our opinion, properly refused. It asked the Court to instruct the jury that "if the plaintiff knew, or by the use of reasonable diligence might have known of the approach of the automobile, and thereby have avoided the danger, then their verdict must be for the defendant."

It would not follow that because he knew of its approach he could have avoided the accident, for he may have learned of its approach too late to have avoided it. It was not only necessary that he should have known, or by the use of reasonable diligence could have known of its approach, but that he should have known of it *in time* to have avoided the accident.

And we find no error in the action of the Court in refusing the fifth and eighth prayers of the defendant, in view of the facts as disclosed by the record.

We think the learned Court below committed no error in refusing the defendant's eleventh prayer. The law as to damages applicable to this case was, in our opinion, properly presented to the jury by the plaintiff's third prayer as modified by the Court. Without setting out and discussing the evidence as to the character of the injuries received by the plaintiff, we will content ourselves by saying that there was evidence tending to show injuries of a permanent character legally sufficient to go to the jury to be considered by it. The prayer as modified instructed the jury that if they found that the plaintiff had suffered additional damage by the breaking of his leg in the hospital after the collision, and that he might have avoided the second breaking by the use of ordinary care and diligence, then he is not entitled to compensation for such additional damage. This, we think, properly stated the law upon this feature of the case.

In the case of the *City of Goshen v. England* (Ind.), 5 L. R. A. 259, similar in many respects to the case now before us, the instruction there given, which was approved by the Supreme Court of Indiana, stated in effect that the plaintiff was not entitled to recover for any pain, anguish or deformity produced by her negligence in the treatment

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of the limb. That if she by her negligence in the treatment of the limb had increased the pain, suffering and deformity, she could not recover for such increased pain, suffering and deformity produced by her own negligence.

The first and second prayers of the plaintiff are identical in form with the first and second prayers in each of the cases of the *B. & O. R. R. Co. v. Trainor*, 33 Md. 542, and *Winner v. Linton*, 120 Md. 280, and which had the approval of this Court in those cases. In the latter case the suit was instituted to recover for personal injuries sustained by the plaintiff in being struck, knocked down and run over by the automobile of the defendant while upon one of the public streets of the City of Baltimore, under circumstances somewhat similar to those found in this case, and with one exception the objections urged against these prayers in this case were made against the prayers in that case.

It is urged in the case before us that there is an inconsistency in the two prayers. This inconsistency, however, we think is more apparent than real. In the first prayer, to enable the jury to find for the plaintiff, they were to find, in effect, "*that on or about the 12th day of September, 1913, the infant plaintiff was injured by an automobile in the possession and control of the defendant while operated by George Hull, an employee of said defendant, on Greenmount avenue, a public thoroughfare of Baltimore City, at or near its intersection with Windermere street,*" and that the injury resulting from a want of ordinary care and prudence on the part of said employee, and not from a want of ordinary care and prudence on the part of the plaintiff.

And in the second prayer they were instructed, in effect, that even if they found a want of ordinary care and prudence on the part of the plaintiff, yet if they further found that its employee had used ordinary prudence and care in the management, control and operation of the automobile the accident could not have occurred, then the plaintiff was entitled to recover, "provided they find the *other* facts set out in the first instruction."

The alleged inconsistency complained of is that in the second instruction the jury was to find as in the first prayer that the injury did not result from a want of ordinary care and prudence on the part of the plaintiff, and were also to find that the plaintiff was guilty of a want of ordinary care and prudence. This is not the meaning of the second prayer, and the jury we think would not so understand it. The jury in the second prayer were to find that the plaintiff was guilty of a want of ordinary care and prudence and were not to find, as in the first prayer, that he acted with ordinary care and prudence, and it was because they were not to so find that they were limited in their finding to the "*other facts set out in the first instruction.*" The concluding words of the second prayer—"provided they find the *other facts set out in the first instruction*"—were taken *verbatim* from the second prayer in each of the two cases above cited, which as we have said, were approved in those cases, although granted, with a prayer identical with the first prayer in this case. The Court we think was correct in its ruling upon the special exceptions thereto and in granting these prayers.

The remaining question presented by this appeal, is upon the action of the Court in refusing the application of the defendant, The Taxicab Company, to remove the case to some other Court for trial.

The suggestion of removal and affidavit thereto was filed with the clerk of the Court on the day of the trial and before the case was called for trial. But the plaintiff interposed objection to the removal of the case upon the ground that the other defendant to the suit, Fred. G. Kitchens, had not joined in the suggestion and affidavit of removal. At such time said defendant was not in Court, but his counsel who was present stated that his client would join therein when he appeared in Court. The Court however refused to remove the case upon this offer and proceeded with the trial of the case. After the jury had been sworn the defendant Kitchens appeared in Court and announced his willingness to join in the suggestion and affidavit of removal, but the

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Court held, that it was then too late for him to exercise the right of removal and proceeded with the trial of the case.

Our predecessors held in the case of *State v. Gore*, 32 Md. 498, that the term "party" as employed in the Constitution, Art. 4, sec. 8, and the Act of 1868, Chapter 180, to regulate and give force to the constitutional provision, when applied to civil causes must be taken in a collective and representative sense where there are more persons than one as plaintiffs or defendants, and, therefore, as there can be no severance, all applications to remove in such cases must be taken as made on behalf of all persons constituting the party-plaintiffs or defendants as the case may be.

In the latter case of *Baltimore County v. United Rys. Co.*, 99 Md. 87, it was said, "the cases in this Court and in the Federal Courts, hold that the right of removal resides in the party plaintiff or defendant and not in each of several plaintiffs and defendants."

See also the more recent case of *Diamond State Co. v. Blake*, 105 Md. 570.

It is true that in each of the two cases last cited its removal was resisted by one or more of the defendants, while in this case there was no resistance on the part of the defendant Kitchen, but whether any one or more of the parties plaintiff or defendant do or do not resist the removal of the case we think is immaterial, so far as the right of removal is concerned, if the suggestion and affidavit of removal is not made for or on behalf of all such parties plaintiff or defendant.

It was too late to exercise the right of removal after the jury was empaneled and sworn. *Price v. State*, 8 Gill, 295; *Cooke v. Cooke*, 41 Md. 368; *McMillan v. State*, 68 Md. 309.

As we find no error in the rulings of the Court the judgment will be affirmed.

Judgment affirmed, with costs to the appellees.

CLAYTON PURNELL

vs.

STATE BOARD OF EDUCATION AND HENRY
SHRIVER.

State Board of Education: appointment by Governor after adjournment of Legislature; Chapter 584 of Acts of 1904.

Statutes: construction; duty of courts. Legislative offices: power of Legislature over.

Where an office is of legislative creation, the Legislature may modify, control or abolish it, and may change the manner of appointment. p. 270

In construing statutes, the intention of the Legislature is always be sought. p. 270

In general, the words employed are to be considered, and they are to be interpreted according to their plain, ordinary and natural import; if they are clear, precise and unambiguous, the Legislature must be understood to mean what it has plainly expressed. p. 270

By Chapter 584 of the Acts of 1904, the Legislature must be presumed to have intended to authorize the Governor to await, if he sees fit, until after the adjournment of the Legislature, before he makes his appointment to the State Board of Education. p. 271

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A statute should, if possible, be so construed as to give effect to every part of it. p. 271

The policy of legislation is not to be determined by the courts, whose duty simply is to see that the legislative intent is carried out. • p. 272

Decided February 17th, 1915.

Appeal from the Circuit Court for Anne Arundel County.
(BRASHEARS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

W. C. Devecmon (with whom was Ridgely P. Melvin on the brief), for the appellant.

Edgar Allan Poe, the Attorney-General, for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

This appeal involves the construction and interpretation of section 5, Article 77, of the Code, being a portion of Chapter 584 of the Acts of 1904, and relates to the formation of the State Board of Education.

The appellant filed a petition, praying that the writ of mandamus issue directing the State Board of Education to recognize him as a member of said board, and ordering the appellee, Henry Shriver, to vacate the office of membership in said board, unlawfully held by him. .

The petition alleged that the petitioner had been appointed a member of said board on the 27th day of April, 1908, for a term of six years from said date, and until his successor should be duly appointed and qualified; that the Governor, during the session of the General Assembly, in the year 1914, nominated to the Senate as his successor, the appellee, Henry Shriver, but that the Senate adjourned without acting upon said nomination; that after the adjournment of the General Assembly, the Governor on the 30th day of April, 1914, undertook to appoint the said Henry Shriver to said office, as the successor of the petitioner, without the advice and consent of the Senate, and issued a commission to him; that at the next succeeding session of the State Board the said board refused to recognize the petitioner as a member, but did recognize the said Henry Shriver as a member thereof. The appellees demurred to the petition, and upon the lower Court sustaining the demurrer and dismissing the petition, this appeal was taken. The statute involved is as follows:

“The Governor, by and with the advice and consent of the Senate, if in session, and without said advice and consent when not in session, shall appoint before the first Monday in May, next ensuing, six persons, at least two of whom shall be from the political party which at the last preceding election for Governor received next to the highest number of votes, said minority representation of at least two members as aforesaid to be continued thereafter, to be members of the State Board of Education, two of whom shall hold office for a term of four years from the first Monday in May next succeeding their appointment and until their successors shall qualify; the Governor shall, at the time of making said appointment, designate the term of years of each of said members when first appointed under this article; the term of office of said members, after the expiration of the term for which first appointed, shall be a term of six years, and to take the places of the members of said board whose terms of office shall so expire, the Governor shall, every two

Md.]

Opinion of the Court.

years after April 12, 1904, before the first Monday in May in such years, appoint two persons as members of said board to serve for terms of six years from the first Monday in May next succeeding their appointment, and until their successors shall qualify; said persons shall be of high character, integrity and capacity; these six members, together with the Governor and the State Superintendent of Public Education, shall constitute the State Board of Education, but principals of the state normal schools and of the normal department of any school or college under the control of the State Board of Education whose certificates are recognized by it shall be ex officio honorary members of this board, but with no vote. In case of a vacancy by death, resignation, disqualification or otherwise, the Governor shall fill such vacancies."

It is not claimed that the appointment was made by virtue of the power contained in the last sentence of the section, relating to the filling of vacancies, for although the term for which the appellant had been appointed had expired, yet as he was to continue to hold the office until his successor was appointed and qualified, there would be no vacancy between the expiration of the definite term and the appointment and qualification of the successor. In other words to authorize an appointment under the vacancy clause, the vacancy must actually exist at the time the appointment is sought to be made, for otherwise the incumbent holds on with all the powers and duties of his appointment. *Smoot v. Somerville*, 59 Md. 84; *Ash v. McVey*, 85 Md. 119. It is claimed, however, by the appellant that the appointment of his successor without the advice and consent of the Senate, was an illegal appointment, and without any effect, and that, therefore, he is entitled to hold the office until his successor is legally appointed and qualified. Whether or not the Governor is authorized, except in cases of vacancies, under the provisions of section 5, Article 77, to appoint successors to the State

Board of Education without concurrence of the Senate, is the sole question to be determined in this case.

This Board is of legislative creation, and no question can now be raised in this State as to the powers of the Legislature to modify, control or abolish it, embracing therein the power to change the manner of appointment of its members, for this Court has many times expressly emphasized this. *Anderson v. Baker*, 23 Md. 627; *Warfield v. County Comm.*, 28 Md. 76; *Townsend v. Kurtz*, 83 Md. 331, and *Ash v. McVey. supra*.

The State Board of Education was created by Chapter 311 of the Acts of 1870, by which, and by all amendments thereto until the present Act, all appointments were expressly required to be made during the regular sessions of the Legislature, in addition to the requirement of their being made with the advice and consent of the Senate. The present act is the first to contain the provision, "and without said advice and consent when not in session." This Act made material changes in the formation of the Board; changing the number of appointed members from four to six, extending the tenure of office from four to six years and providing for a continuous minority representation of two members. For the first time also the limit in point of time within which the appointments should be made was changed from during the session of the Legislature to prior to the first Monday in May.

Now it being settled that the Legislature had the power to make the changes it apparently did make, did it in reality intend to give the Governor the power to do away with the concurrence of the Senate in the appointment of members to this Board? In construing all statutes the aim is to get at the intent of the Legislature; and to arrive at this there are certain and fixed rules. And one that is particularly applicable to this statute is that first, the words employed are to be considered, and they are to be interpreted according to their plain, ordinary and natural import; if they are clear, precise and unambiguous, the Legislature must be understood

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to mean what it has plainly expressed. *Clark v. Baltimore*, 29 Md. 277; *Scaggs v. Balto., etc.*, R. R., 10 Md. 277; *Leonard v. Wiseman*, 31 Md. 205; *Maxwell v. State*, 40 Md. 273. Applying to the present statute this principle, it seems clear that the meaning of the Legislature was to authorize the Governor to await, if he saw fit, until after the adjournment of its body before making the appointments to this board. Of course they must be presumed to have known that the first Monday of May would be approximately a month after the day of the adjournment of any regular session. The fact that the first appointments were to be made before the first Monday in May can be accounted for on the theory that probably they feared the Act would not become operative until after the adjournment of the Legislature, but no such reason can account for authorizing the Executive to have until the same time before appointing the successors. The only way we could reach the conclusion sought by the appellant in reference to the portion of the statute regulating the appointment of successors, would be to declare that the opening language of the section was, as a whole, applicable only to the original appointments, and that when the successors were to be appointed the words "and without said advice and consent when not in session" were to be ignored, and that further the time limited for the appointment of the successors as expressed by the words "before the first Monday in May" were also to be completely ignored. This would ignore entirely the rule of construction that every statute should be so construed as to give effect to every part of it if possible.

The appellant attempts to argue away the effect we think the time limit should have, as expressing the intent of the Legislature, by contending that not much force is to be given to a provision as to time in a statute in the interpretation of that statute, and refer to *State v. County Com.*, 29 Md. 516, and similar cases. In the cited case the question involved was whether or not certain officers after the expiration of the time limited by the statute for the doing of a certain object, could be compelled to do that thing; and the Court

held that time in that use was directory merely, unless it plainly appeared that the designation of time was intended as a limitation of power. How that principle can have any applicability here we are at a loss to understand. There is no question involved here as to whether the appointment was or not made before or after the time limited, but rather, whether it could be made at all. And as bearing upon the intention of the law makers in a case of the character of this we think the expression of time has a most potential bearing.

Because the history of the legislation shows that the advice and consent of the Senate had previously been a requisite, we think, in this case, lends no aid in favor of the appellant's construction. Conceding this to have been the first time the consent of the Senate was not required, as the legislation shows to be a fact, still, where the language in unambiguous terms shows there was to be a change in that respect, the history can have no effect, but can only have bearing in solving doubts arising over new legislation. For the same use only is the fact that previous executives had acted contrary to the present executive. As to the wisdom of the Legislature in making this change, or their reason for making it, we are not concerned; for the policy of legislation is not to be determined by the Courts. When the true intent of the legislative branch of the government, as to certain legislation, is determined, it is the duty of the Courts to see that that intention is carried into effect. If persons believe the provisions are unwise, the appeal should be made to the law-making powers and not the Courts.

Agreeing with the lower Court in its action in sustaining the demurrer, we will affirm the order appealed from.

Order affirmed, with costs.

Md.]

Syllabus.

MILTON C. GREER AND THOMAS A. DAVIS

vs.

FRANK WHALEN.

*Warranties: no express words necessary; province of jury;
breach; waiver; what is not.*

To create an express warranty, the word "warranty" need not be used; nor is any precise form of expression required.

p. 279

Any affirmation of the quality or condition of the thing sold (not uttered as mere opinion or belief), made by the seller at the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied on by him, is an express warranty.

p. 279

In the case of an oral contract, it is the province of the jury to decide as to the existence of these necessary ingredients of a special warranty, by considering all the circumstances attending the transaction; provided evidence adduced to show the facts was legally sufficient to be submitted to the jury.

p. 279

Upon a breach of warranty, the buyer may return the chattel, if delivered, within a reasonable time after discovering the breach, and recover, in the common counts, the amount paid. Or, he may retain the chattel and sue upon the contract for the damages resulting from the breach of warranty.

p. 280

Where A. had purchased cattle upon the assurance that they would be the same as he had been buying, and the cattle arrived at a station at some distance from A.'s farm, while he was absent on a trip South, the fact that his farm manager went for them and brought them to the farm, and the fact that A. had left a blank check for the cattle with an agent who filled in the amount for the bill, and delivered it to the vendors, did not operate as a waiver of a breach of the contract, when, as soon as A. returned and saw the cattle, he complained to the vendors of their condition, and requested them to take them off his hands. pp. 281-282

In such case, the question of the condition of the cattle sold is one for the determination of the jury. p. 281

Decided February 27th, 1915.

Appeal from the Court of Common Pleas. (DOBLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

S. S. Field (with whom was *Wm. F. Pirscher* on the brief), for the appellants.

Edward M. Hammond, for the appellee.

PATTISON, J., delivered the opinion of the Court.

The appellee, a merchant of Baltimore City, was in the year 1909 the owner of a farm near Ellicott City, in Howard County, and the appellants were dealers in livestock at the Union Stock Yards in said city.

Md.]

Opinion of the Court.

The appellee in the fall of each year for a number of years prior to that time had bought from the appellants small young cattle, known as stock cattle, and had placed them upon his farm where they were fattened and improved and were thereafter, in the succeeding year, sold at the stock yards through the agency of the appellants.

According to the evidence offered on the part of the appellee, he, in the fall of 1909, called a number of times at the stock yards, but could not find there any cattle to suit him. It was then that the appellants suggested that he let them sell to him, to be shipped from Chicago, "heifers the same as he had been buying of them" at the Baltimore Stock Yards, in the previous years; the price therefor f. o. b. Chicago would be \$2.75 or \$2.80 per hundred weight, certainly not exceeding \$2.85. The appellee testifies that as a result of this suggestion and offer an agreement was then and there entered into by and between them, by which the appellants sold to him, to be delivered in good condition on the cars at Chicago, at and for the sum of \$2.75, and not to exceed \$2.85 per hundred weight, one carload of sound, thrifty, young heifers, not to exceed forty in number, of the class and type he had previously been buying from them; and it was understood and agreed that the cattle so purchased should be dehorned and that there were to be no white ones or Jerseys among them.

This contract or agreement was made about November 29th, a few days before the appellee was to start for the South, and as he was not to return for several weeks, he left with one Rogers, with whom he was in some way associated in the mercantile business, his check signed by him and drawn to the order of the appellants, with the amount blank, but with direction to Rogers to fill in such blank with the amount given to him by the appellants when the exact weight and price of the cattle were ascertained and communicated by them to him. He then notified the appellants of this arrangement.

The cattle were shipped from Chicago on Thursday the 9th day of December, and arrived in Howard County on Sunday afternoon, the 12th day of December, three days thereafter, but instead of putting them off at Hollofields Station, they were carried to Ellicott City, because, as stated, there was no chute at Hollofield by which they could have been unloaded.

On the 13th day of December the appellants wrote to Rogers enclosing statement giving the weight as well as the price of the cattle. The price, as stated therein, was so much as \$3.25 per hundred weight for seventeen of the cattle and \$3.00 per hundred weight for the remaining twenty-three. In the letter to Rogers the appellants stated to him that upon the return of the statement with check for amount shown by the statement to be owing by appellee, they would receipt the statement and forward it to him. Rogers in response to this request filled in the check for the amount stated in the enclosure to him and, with the statement, sent it to the appellants, on the 14th day of December, and it was thereafter endorsed and used by the appellants; the statement which was receipted and returned to Rogers was given by him to the appellee upon his return from the South.

The appellee, before leaving for the South, directed Tucker, the manager of his farm, to get the cattle upon their arrival at the station and take them to the farm. They arrived at Ellicott City, as we have said, on Sunday afternoon between two and three o'clock, but it was not until nearly dark that Tucker got word from the station agent that the cattle were there. It was then too late to get them to the farm that evening, the farm being several miles away, and thus they were required to remain all night in the open pen at the station. On the following morning, however, Tucker started with them from the station, but owing to their condition "two of them fell on the road and had to be rested well before he could get them home." He describes their condition at that time as being a terrible looking lot of cattle, running at the nose, sore eyes, and seemed to have sore throats."

Md.]

Opinion of the Court.

David Whalen, son of the appellee and at that time a medical student living in Baltimore, visited the farm at least once a week. He saw the cattle on December 14th and frequently thereafter, and when asked to describe their condition when he first saw them, the second day after their arrival, he said of them that they were poor, their coats were rough, they had pus formation in the eyes, or around the eyes, with a bluish scum like covering over the eyes, and running from the nostrils. He stated that the entire eyeball seemed to be affected and there was a constant leak of pus from the nose. This was true, he said, of at least three-fourths of them; and of the entire number nine of them died. He also said that many of them were practically blind. A description of their condition some days thereafter, given by another son of the appellee, is very similar to that given by David.

The appellee reached Baltimore on his return from the South on the 20th day of December, and on the succeeding day, December 21st, before he had an opportunity to see the cattle, he wrote the appellants as follows:

"I have just returned from the South and am informed by my son that the cattle have arrived. There has been a great mistake somewhere. I explicitly told you that I wished these similar to what I had formerly bought of you, and wanted them all dehorned. A part of these are dehorned, but there is no comparison between the quality of them and those you have formerly sold me; beside I am under the impression that there is a mistake in the weight. I consider this a lot of trash, basing my opinion upon what my son says. I have not seen them, and will kindly request that you take them off my hands. Three of them are dead, and there are about ten more that I think will die. It is certainly a diseased lot of cattle.

"I called you up over the telephone, but could not get in communication with you. Kindly let me hear from you promptly."

Either on the first or second day after writing the above letter the appellee went to the farm and after seeing the cattle and finding them in the condition described by his son David, called the appellants over the 'phone and again asked them to take the cattle back and refund to him the money he had paid to them under the facts and circumstances as above stated. But the appellants refused to do so, and it was then that the appellee brought his suit, which has resulted in the judgment from which this appeal is taken.

The facts as revealed by the appellants' evidence is altogether different from those given in evidence by the appellee. They deny that they sold said cattle to the appellee, but state that at his request and upon his direction they ordered the cattle to be shipped to him from Chicago, and that they were to receive only a commission, amounting, as the aforesaid statement discloses, to \$14.36. That there was no warranty of soundness or as to any other quality or condition of the cattle.

The declaration contains the common counts and two special counts. In the first of these it is alleged that the amount paid by check filled in by Rogers, upon the statements sent him by appellants, was in excess of the amount that was to be paid, under the alleged contract between the parties, for the cattle purchased thereunder, and it was to recover such overcharges that this count was inserted in the declaration. The second special count is upon the contract for damages resulting from the breach of the alleged warranty. The correctness of the pleadings is not questioned. It is on the ruling of the Court upon its instruction to the jury and the admissions and exclusion of certain testimony that the case is before us.

The contentions of the appellants, as stated in the brief, are as follows:

"1. That by receiving the cattle and paying for them and waiting ten days before making any complaint during which time several of the cattle had died, the plaintiff had lost his right, if he had any, to re-

Md.]

Opinion of the Court.

scind the contract for any alleged difference between the cattle contracted for and the cattle delivered, and therefore the Defendants' Sixth Prayer should have been granted.

"2. That there is no implied warranty upon the sale of live stock, and that there was no evidence legally sufficient to prove any express warranty in the transaction between the plaintiff and the defendants, and therefore the Defendants' Second and Third Prayers should have been granted.

"3. That the Court erred in certain rulings in admitting and rejecting evidence."

We will first consider the second of these contentions, not that there was no implied warranty, but whether there was evidence legally sufficient to go to the jury tending to prove an *express* warranty.

To decide this question we must determine the character of evidence to be offered tending to prove an express warranty.

Our predecessors said so early in the case *Osgood v. Lewis*, 2 H. & G. 518, that "to create an express warranty, the word 'warrant' need not be used; nor is any precise form of expression required. Any affirmation of the quality or condition of the thing sold (not uttered as a matter of opinion or belief), made by the seller at the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase; if so received and relied on by the purchaser is an express warranty. And in case of oral contracts on the existence of these necessary ingredients to such a warranty, it is the province of the jury to decide, upon considering all the circumstances attending the transaction. It is in the *oral* contract set up by the appellee and the one upon which he seeks to recover damages resulting from the breach of the warranty that the appellee claims such warranty is found, and the question whether it is so found to exist in said oral contract was for the deter-

mination of the jury, if the evidence adduced at the trial tending to show such facts was legally sufficient to be submitted to the jury for its consideration, and, in our opinion, the evidence in relation thereto, which we will not repeat or discuss, was legally sufficient to go to the jury."

As to the first contention, this Court has repeatedly said, the last time in the case of *White Automobile Co. v. Dorsey*, 119 Md. 258, that "upon a breach of the warranty two remedies are opened to the buyer; first, he may return the chattel, if delivered, within a reasonable time after discovering the breach, and recover back in assumpsit on the common counts the amount paid; or, secondly, he may retain the chattel and sue upon the contract for damages resulting from the breach of the warranty." *Crenshaw v. Slye*, 52 Md. 146; *Franklin v. Long*, 7 G. & J. 419; *Horn v. Buck*, 48 Md. 358; *Tayman v. Mitchell*, 1 Md. Chy. 501, and other cases.

The appellee in this case upon his return from the South, nine days after the arrival of the cattle in Howard County, and after learning from his son of the alleged condition of the cattle, at once wrote to the appellants asking them to "take the cattle off his hands;" to which letter he received no reply. On the first or second day after his return he visited the farm and saw the condition of the cattle and again communicated with the appellants, this time over the 'phone, complaining of their condition, and telling them that he would on the following Monday morning return the cattle to them, but they stated that they would not receive them. It was because of this refusal that he retained the cattle and instituted suit upon the contract for damages resulting from the breach of the alleged warranty, a remedy that was open to him under the settled law of this State, unless he had in some way waived the breach: and upon an examination of the facts disclosed by the record we fail to find any such waiver.

Md.]

Opinion of the Court.

It is true that after their condition had been observed by the farm manager they were taken by him from the station at Ellicott City to the farm of the appellee, where they were cared for until the appellee returned. The manager was acting under limited directions from the appellee to get the cattle from the station and drive them to the farm. The appellee, of course, was not expecting the cattle to arrive in the condition above described and no authority was conferred upon the manager to do more than to take them from the station to the farm, and this he did. The fact that the manager took the cattle from the station after their delivery to the appellee in Chicago, and carried them to the farm of the appellee, were a much more satisfactory investigation could be made with a view of ascertaining whether there was an actual breach of the warranty, could not, we think, have the effect of a waiver of the breach. Nor should the fact that the appellants were not notified of the condition of the cattle by the manager or sons of the appellee be regarded as a waiver of the breach, when it is not even shown that they knew from whom the cattle had been purchased or that the appellants were interested in them; and the promptness with which the appellee acted in the matter upon his return home is altogether inconsistent with any waiver of the breach on his part at such time.

It was also argued by the appellants that there was no legally sufficient evidence as to a breach of the warranty, because of a want of evidence on the part of the appellee as to the condition of the cattle at the time of delivery in Chicago. In reply to this, we will state that the evidence of Dr. Mackie, the veterinary surgeon called to the stand as an expert by the appellee, was, we think, legally sufficient to go to the jury tending to show the unsound condition of the cattle at the time of such delivery. There was produced on the part of the appellants evidence as to their sound condition at such time, but the question of soundness *vel non* was one for the jury to determine upon the evidence before it.

The ruling upon the first exception to the evidence, which exception it seems is not pressed by the appellants, was, we think, correct. And we find no error in the rulings of the Court as to the second and third exceptions.

In the fourth exception to the testimony the Court was asked, at the conclusion of the plaintiff's testimony, to strike out, first, all the testimony of Frank Whalen tending to show a warranty of soundness of the cattle; and, secondly, all the testimony of the plaintiff in regard to the price and quality of the cattle, for the reason that such parol testimony was not permissible to vary the written memorandum of sale. The question here presented is fully answered by what we have said of the oral contract in this case, in connection with said alleged warranty.

As to the fifth exception, it would seem that the question was thereafter answered; if so, there is no cause for complaint on the part of the appellants. But if it were not so answered, the evidence does not disclose, we think, sufficient qualification to entitle the witness to speak as an expert. As a matter of fact, he may have possessed knowledge sufficient to enable him to have so testified, but this fact is not shown by the record.

Having fully discussed the law applicable to this case, and finding no departure therefrom by the Court below in its rulings upon the prayers, we deem it unnecessary to discuss them, and will therefore affirm the judgment of the lower Court.

Judgment affirmed, the appellants to pay the costs.

Md.]

Syllabus.

HARRISON G. WARD

vs.

BALTIMORE AND OHIO RAILROAD COMPANY.

Railways: freight cars; injury; trespassers; duty of railroad's employees.

Where, without the invitation, express or implied, a person, by his voluntary, independent act, without the knowledge or permission of the railway company, enters upon a freight car standing on a siding, he is to be regarded as a trespasser. p. 287

Where, for the purpose of allowing a freight car to be unloaded by the consignee, a railway company leaves it standing upon a siding in front of a freight shed, and a person, without the invitation of the railway, either express or implied, and without its permission or knowledge, enters the car, and while in the act of leaving it is injured by other freight cars, which were shunted against the car, such person is not entitled to recover damages resulting from the accident, unless he can show that the railway's servants had knowledge of his peril in time to avoid the injury, and that they then failed to exert proper care to avoid the injury. p. 288

Decided March 2nd, 1915.

Appeal from the Circuit Court for Montgomery County.
(PETER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UENER, STOCKBRIDGE and CONSTABLE, JJ.

Thomas W. Dawson and Alexander Kilgour, for the appellant.

James A. C. Bond and Francis Neal Parke, for the appellee.

PATTISON, J., delivered the opinion of the Court.

The suit in this case was brought to recover damages for personal injuries sustained by the appellant in consequence of the alleged negligence of the appellee.

On the morning of the 26th day of September, 1911, the appellant called at the station of the appellee company in Gaithersburg, Montgomery County, Maryland, and inquired of its agent if an empty car which he had ordered a few days before, to be used by him in the shipment of straw, had arrived and was told by the agent that it had not. He then left the station on the north side of the railroad for the office of one Thomas I. Fulks, located on the south side of said road. His object, as he states, in going to the office of Fulks, a dealer in lime, fertilizer, etc., was to see him concerning some feature of a business transaction in which Fulks had sold him lime. On his way to said office he met Fulks going to his warehouse on the north side of the railroad, and therefore instead of going to the office he accompanied Fulks to his warehouse. The warehouse of Fulks is to the eastward of the station and fronts 90 feet on a switch or siding of the appellee's road, and is five feet and six inches from its right of way. At the time referred to above, there was a car of the appellee upon said siding in front of said warehouse containing fertilizer belonging to Fulks which was partially unloaded, but at such time no one was at work unloading it.

Md.]

Opinion of the Court.

The servants or employees of Fulks who had been engaged in unloading it, had stopped work and had gone, for water, to a pump in a yard about thirty yards away. The car door was open and so was the door of the warehouse immediately opposite, and connecting the car with the warehouse was a board or gang-plank about eighteen inches or two feet in width, and something over six feet in length, one end of which rested upon the sill of the door of the warehouse and the other end upon the floor of the car at the open door. It was over this board or gang-plank that the employees of Fulks, by the use of trucks, carried the fertilizer from the car to the warehouse.

The appellant in his testimony stated that after transacting the aforesaid business with Fulks, and while still in the warehouse he saw through its open door the said car upon the siding and without anything being said by Fulks or himself, they walked from the warehouse into the car where they remained only about one-half minute, when they started to return over the said board or gang-plank to the warehouse. He further stated that just as Fulks, who preceded him, "took the last step off of the board or gang-board with one foot in the warehouse" a car came down the siding and struck the car they had just left, causing him to be thrown to the ground a distance of five or six feet, and that in the fall he sustained severe and painful injuries to the wrist and that his leg was bruised and his cheek was cut. In leaving the car he did not look for an approaching car upon the siding, had he done so there seems to have been nothing to prevent him from seeing it, but as it was he did not know of its approach until the collision occurred, and that as a result of the fall he "did not know anything for quite a while thereafter." As he described it, "I was walking right out, I did not see any car at all. The first thing I knew I was down." The car that collided with the one in front of the warehouse was one of four that had been shunted upon the siding.

The conductor who was placed upon the stand by the plaintiff, appellant here, stated that at the time he shunted the cars mentioned he "made an effort to see whether or not Fulks was unloading any cars, by going down the track as far as the company's station office, which was about eight or nine car lengths from Fulks' warehouse, and he saw a car down there and did not see it being unloaded, but did not intend that the car when shunted should go down the track that far, but intended to stop them just about clear of the crossing, seven or eight car lengths east of the warehouse. That it was his duty when freight cars were being unloaded by people to notify those unloading cars on the track and that he notified all that he saw that day. That the accident happened when four cars were cut off of the train at the east of the switch and shunted west and it was intended for them to stop down by the crossing, just clear of it. The brakeman did not get the cars stopped in time and they went on down the track and ran against the car of Fulks, * * *. That the cars did not stop at the crossing because the brakeman did not have them under control or from something or other, although the brakeman was an experienced man and the brakes were in proper condition, * * * the brakeman did not start to brake in time, but he could not say that this was due to the inefficiency of the brakeman, as it is a matter of judgment where to shut off.

The brakeman was also called to the stand by the plaintiff and he testified that "two of the cars he was riding and switching were loaded and two empties. The loaded cars were with fertilizers and very heavy. The grade was about 75 feet to a mile, a good grade; was moving with the grade. Was sitting on third car from the front end with two cars ahead." He further testified that he "did not see anybody unloading the car in front of the warehouse, nor in front of car or around it," and he "did not see the plaintiff on the gang-plank, nor Mr. Fulks. * * * When the cars struck the car opposite the warehouse they were not moving over three or four miles an hour; if they were moving that fast."

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Opinion of the Court.

Just why and for what purpose the appellant went into the car of the appellee does not satisfactorily appear from the record. He was not invited by any one, and only remained in the car for about one-half minute and while there said or did nothing so far as the record discloses. He in his testimony says "I walked in there with him (Fulks) with the intention that if he did not intend to reload that car, that I would. I was almost sure of getting the car if he did not want it. I always have to go in a car to see if it suits before I load it with stray; you have to have a certain size car or you cannot get the rates on it." Notwithstanding what he says as to his purpose in going into the car, he never said anything to Mr. Fulks either before or while in the car as to whether he was going to reload it, nor did he make any allusion to the fact that he wanted the car. He further attempted to explain why he entered the car by saying he wished to ascertain the size of it, but he thereafter admitted that the dimensions of the car were shown upon the outside and not on the inside. But whatever might have been his object or purpose in entering the car he certainly was not allured or induced to do so by the defendant or its agents. He had been told by the agent at the station that there was no car at that time for him; and it was not suggested to him by the defendant and he was not induced by it, to enter upon the property in search of a car that would suit his purposes and one that he could get if it was not to be reloaded by the party then using it.

His entrance upon the property of the defendant was not upon its invitation either expressed or implied, but it was his voluntary independent act done without the permission or knowledge of the defendant so far as the record discloses, and therefore under the well-established law of this State, the appellant must for the purposes of this suit be treated as a trespasser upon the property of the appellee and to entitle him to recover damages resulting from the injury sustained, he must show (1) That the appellee's servants had knowledge of his peril; (2) That they had knowledge in time to avoid

the injury; (3) That they then failed to exert proper care to avoid the injury. *W. Md. R. R. Co. v. Kehoe*, 83 Md. 434; *W. Va. Cen. R. R. Co. v. Fuller*, 96 Md. 666.

The evidence of the conductor and brakeman offered on behalf of the plaintiff which has been hereinbefore very fully set out, clearly shows that the peril of the plaintiff was never known to the servants of the defendant and consequently they could not have avoided the injury sustained by him.

The Court below at the request of the defendant granted a prayer at the conclusion of the plaintiff's evidence, instructing the jury that under the pleading and evidence in this case, the plaintiff has offered no evidence legally sufficient to entitle him to recover. This is the only exception before us, and from what we have said as to the effect of the testimony offered, the Court was correct in its ruling upon this prayer.

The declaration contained two counts, to the second of which a demurrer was sustained.

As was said by this Court in *Maenner v. Carroll*, 46 Md. 212, "to constitute a good cause of action in a case of this nature, there should be stated a right on the part of the plaintiff, a duty on the part of the defendant in respect to that right, and a breach of that duty by the defendant whereby the plaintiff has sustained injury." These requisites are not found in the second count of the declaration. All the facts alleged in such count, may be true and yet the plaintiff would have no right of action against the defendant. The mere fact that the plaintiff was upon the gang-plank and sustained the injury complained of, does not give him the right to recover against the defendant. It must be shown by the declaration that he was rightfully there, or if not rightfully there that the defendant by proper care could have avoided injury to him after it discovered his peril, which is not shown by this count of the declaration. *Maenner v. Carroll*, *supra*.

Finding no errors in the rulings of the Court below, the judgment will be affirmed.

Judgment affirmed, appellants to pay the costs.

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Syllabus.

BEALE R. HOWARD

vs.

JOHN RUSH STREET.

*Agency: revocation; rights of agent. Real estate brokers:
commissions.*

Where the authority of an agent is not coupled with an interest, nor conferred for a valuable consideration, it may be revoked at any time, at the pleasure of the principal. p. 300

But where a sale made by a principal is the result of the agent's efforts, made before his authority was revoked, the agent can not be deprived of his right to the commissions agreed upon, if it be established that the purpose of the principal, in withdrawing the authority of the agent, before the sale was actually consummated, was to avoid the payment of the commission.

pp. 300, 301

In such cases, the evidence of the purchaser as to whether or not his action in making the purchase had been influenced in any way by the agent, before the revocation of the agent's authority, should be received.

pp. 303-304

While sometimes the misleading effect of one prayer may be held to have been corrected by a prayer of the opposite party, such a rule is not to be applied in the case of a serious error.

p. 302

Decided April 7th, 1915.

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Prayers.

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Appeal from the Circuit Court for Baltimore County.
(DUNCAN, J.)

The facts are stated in the opinion of the Court.

The following are the prayers of the respective parties, and the action of the Court thereon:

Pltff.'s 1st Prayer—The Court instructs the jury at the request of the plaintiff, that if they find from the evidence that the plaintiff was employed by the defendant in May, 1911, to sell his farm known as "Verdant Valley" at a commission of five per cent, and that the plaintiff in pursuance of said employment showed said farm to Frank A. Bonsal, in the spring and early summer of 1911, and introduced said Bonsal to the defendant in June, 1911, and kept said farm before said Bonsal for several months thereafter, and that the defendant and said Bonsal continued said negotiations from time to time until October, 1911, and again during the summer and autumn of 1912, when the defendant sold said farm to said Bonsal, and further find that the efforts of the plaintiff were efficient in bringing about said sale, then the plaintiff is entitled to recover in this action, even though the jury may further find that in March, 1912, the defendant wrote the plaintiff the letter offered in evidence, withdrawing said farm from sale. (*Granted.*)

Pltff.'s 2nd Prayer—If the jury find for the plaintiff under his first prayer, and further find that the defendant's farm sold for thirty-five thousand dollars (\$35,000), then the plaintiff is entitled to recover the sum of seventeen hundred and fifty dollars (\$1,750), with interest thereon in the discretion of the jury from January 1st, 1913. (*Granted.*)

Deft.'s 1st Prayer—The defendant prays the Court to instruct the jury that under the pleadings and evidence in this case there is no legally sufficient evidence to entitle the

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Prayers.

plaintiff to recover, and their verdict must therefore be for the defendant. (*Refused.*)

Deft.'s 2nd Prayer—The defendant prays the Court to instruct the jury that if they believe from the evidence that the plaintiff originally introduced the witness Frank Bonsal to the defendant, and that said Bonsal thereafter became interested as a prospective purchaser of the farm of the defendant referred to in the evidence, and that before said sale was consummated the defendant decided that he would not sell said farm and withdrew the same from the market, and notified both the said Bonsal and the plaintiff that it had been so withdrawn; and shall further believe from the evidence that the plaintiff immediately after receipt of formal notice to such effect expressed his gratification that said farm had been so withdrawn from the market, and made no claim to any compensation for having procured the said Bonsal as a prospective purchaser therefor; and that the defendant was led by said conduct of the plaintiff to understand that he had no claim against him for having procured the said Bonsal as a prospective purchaser for said farm; and if the jury further believe from the evidence that the defendant some months later in good faith changed his mind and determined to put said farm on the market again, and entered into negotiations with the said Bonsal for the sale of the same, and that it was subsequently purchased by the said Bonsal under the written agreement offered in evidence after lengthy negotiations in which the plaintiff took no part, then under the pleadings and evidence in this case the plaintiff is not entitled to recover the commission sued for herein. (*Refused.*)

Deft.'s 3rd Prayer—The defendant prays the Court to instruct the jury that if they believe from the evidence that the plaintiff originally introduced the witness Frank Bonsal to the defendant, and that the said Bonsal thereafter became interested as a possible prospective purchaser of the farm of the defendant referred to in the evidence, but was pecuniarily unable at the time to purchase the same, and that while the said Bonsal was still in a position of pecuniary inability

to purchase said farm, the defendant withdrew said farm from the market, and so notified both the plaintiff and said Bonsal to such effect, and shall further believe that the said Bonsal thereupon abandoned the idea of attempting to purchase said farm, and that the plaintiff, after being notified of the withdrawal of said farm from the market as aforesaid wrote the defendant that he was delighted to hear the defendant was not going to sell said farm, and made no claim to any compensation for having interested said Bonsal in the same, and that at a subsequent interview with the defendant in Washington, the matter of the withdrawal of said farm from sale was again mentioned, and the plaintiff again made no claim to any compensation for having interested the said Bonsal therein; and that in the month of July following the defendant acting in entire good faith changed his mind and determined to sell said farm, and thereupon entered anew into negotiations with the said Bonsal for the sale of said farm, said negotiations extending until about October 12th, when the sale was finally consummated by the defendant making the said Bonsal the concessions as to deferred payments on the purchase price of said farm set forth in the agreement of October 15th, 1912, and that from the time of the withdrawal of said farm from sale as aforesaid, the plaintiff never made any further efforts either to induce the defendant to sell said farm to the said Bonsal or to induce the said Bonsal to purchase it from the defendant, and, in fact, took no part whatsoever in the negotiations beginning in (in) July, 1912, and ending in October, 1912, for the sale of said farm, then, under the pleadings and evidence in this case the plaintiff is not entitled to recover the commission sued for herein. (*Granted.*)

Deft.'s 4th Prayer—The Court instructs the jury that if they believe from the evidence that the defendant placed his farm "Verdant Valley" in the hands of the plaintiff for sale at \$35,000, with the understanding that he should receive a commission of 5% on the purchase price if he found a purchaser therefor, then the defendant had a legal right to ter-

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minate said agency and withdraw said farm from sale at any time prior to the time the plaintiff should produce a purchaser ready, willing and able to buy said farm at such price; and that if the jury shall believe from the evidence that the defendant did so withdraw said property from sale, and notified the plaintiff to such effect, and that the defendant expressed his assent to such withdrawal, then the defendant had a legal right at any time thereafter to change his mind and again put said farm on the market and was under no legal obligation to refrain from negotiating thereafter with any prospective purchaser whom the plaintiff had introduced to him or interested in said property prior to the withdrawal of the same from sale as aforesaid, and that by so dealing with any such purchaser under the circumstances aforesaid and selling said property to him, the defendant did not become obligated to pay the plaintiff said commission of 5% upon the purchase price for said property, and if the jury believes from the evidence that the sale of the defendant's property to the witness Bonsal was made under such circumstances, and after the employment of the plaintiff to make such sale had been terminated in good faith by the defendant and assented to by the plaintiff as aforesaid, then, under the pleadings and evidence in this case the plaintiff is not entitled to recover. (*Refused.*)

Deft.'s 5th Prayer—The defendant prays the Court to instruct the jury that under the pleadings and evidence in this case, in order for them to find that the plaintiff was the procuring cause of the sale of the defendant's farm "Verdant Valley" to the witness Bonsal, it is not sufficient for the jury merely to find that the plaintiff interested the said Bonsal in the purchase of said farm, and introduced and put him into communication with the defendant, but the jury must further believe, in order to entitle the plaintiff to recover, that such introduction was the foundation upon which the negotiation of said farm was begun and conducted, and that the negotiations so begun by the plaintiff were the ultimate cause of the sale by the defendant to the said Bonsal; and if the jury

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believe from the evidence that the negotiations which the plaintiff began with the said Bonsal were subsequently broken off, by the defendant's withdrawal in good faith of said farm from sale, and that such withdrawal was assented to by the plaintiff, who expressed his pleasure at the same, and that the defendant subsequently changed his mind and put said farm on the market again, and entered into negotiations with the said Bonsal for the sale and purchase of the same, which new negotiations culminated in the sale of October 15th, and that the plaintiff took no part in such new negotiations, then under the pleadings and evidence in this case the plaintiff is not entitled to recover, and the verdict of the jury must be for the defendant. (*Granted.*)

The cause was argued before BOYD, C. J., BRISCOE, UERNER, STOCKBRIDGE and CONSTABLE, JJ.

Osborne I. Yellott and Moses R. Walter, for the appellant.

S. A. Williams and Elmer J. Cook, for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

This is an appeal from a judgment recovered by the appellee against the appellant, in an action for commissions on the sale of the appellant's real property, known as the Verdant Valley Farm, and situated in both Baltimore and Harford Counties. The record contains eight exceptions to the rulings of the Court—seven relating to questions of evidence and one to the ruling on the prayers. Two prayers were offered by the appellee and five by the appellant. The Court granted both of those for the appellee and also the third and fifth for the appellant, but refused his first, second and fourth. The first of the appellant's asked the Court to direct, as a matter of law, a verdict for the defendant. It will be necessary, for a determination of the correctness or incorrect-

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ness of the Court's ruling thereon to review the testimony so as to ascertain whether the plaintiff presented such a state of facts as entitled him to recover.

The appellee owned and lived upon a farm adjoining that in question of the appellant, and had been an intimate friend of the appellant for a number of years. He was a member of hunt clubs of the neighborhood and an ardent fox hunter. He had an extensive acquaintanceship among the hunting class, and annually rented his house and premises to the hunt clubs for a month. The appellant for the last several years had only occupied his farm in the summer; living in Washington during the winter. Among the intimates of the appellee was Mr. Frank A. Bonsal, the owner of a farm in the Green Spring Valley, and himself an ardent hunter, having visited the appellee's farm with the hunt clubs, and having for a number of years hunted over the farms of both the appellee and appellant, but who was not acquainted with the appellant. Mr. Bonsal had on several of his visits expressed to the appellee his desire to own the farm of the appellant, and, in the spring of 1911 requested the appellee to get a price on it. The appellee wrote to the appellant for that purpose, but received no answer, and two weeks later wrote again, Mr. Bonsal in the meantime having inquired of him whether he had found out the price. In answer to these two letters, the appellee received the following letter, which forms the contract sued on in this case:

"Washington, D. C., May 16, 1911.

"*Mr. John Rush Street.*

"*Dear Rush:*

"It was not my intention to ignore your question. Yes; Verdant Valley Farm is for sale. \$35,000 is the price I place on it. My assessment (including personality) last year was nearly \$25,000. I carry about that amount of fire insurance (paid in advance 2½ years); possession given at once if desired. I would say there are over 80 acres in wheat and rye, 80 acres in corn,

75 acres in grass, 100 acres in pasture, 40 acres in woods, 5 acres in oats, 7 acres in cowpeas.

"I think the usual commission is 5%. I would be glad if Rush Street would earn this commission.

"Yours truly,

B. R. HOWARD."

The appellee sent this letter to Mr. Bonsal and asked him to come up and go over the place. About ten days thereafter Mr. Bonsal, with his wife and son, went to the farm of the appellee, and, after spending the night there, visited Verdant Valley Farm, and, in company with the manager of the place, went thoroughly through the house and buildings and over the land, spending about four hours in the inspection.

The appellee immediately wrote the appellant of this visit and that Mr. Bonsal was interested in the place. On June 18th, following this visit, Mr. Bonsal, with two of his brothers-in-law, rode to the appellee's home, whereupon the appellee called the appellant on the telephone, who at that time was at his farm, and invited him over to meet Mr. Bonsal. Mr. Howard went over and the introduction was made, and, on the return of Mr. Bonsal and his friends, they all, including the appellee, called at Mr. Howard's place.

The appellee further testified that he constantly, after the receipt of the letter, called to see Mr. Bonsal at his Baltimore office to talk over the matter of the sale with him, but that after the introduction by him of Mr. Bonsal and the appellant, the negotiating was principally carried on directly between them, although he continued to call on Mr. Bonsal in reference to it.

The appellee learned indirectly that the farm had been withdrawn from the market in October, 1911, and in March, 1912, received a letter from the appellant, advising him of the withdrawal. We will insert only the portion of the letter in any way bearing on this controversy:

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"Verdant Valley Farm is not on the market. The understanding between us on a 5% basis, is over. If, in the future, the spirit moves us to dispose of this property, I shall stipulate that the sum of five hundred dollars be the compensation to the agent who brings the purchaser. I make this statement, Rush, to avoid any possibility of a misunderstanding."

The appellee replied to this letter, to the effect that he was glad he was not going to sell the place, for too many of the old places were changing hands.

In April he called on Mr. Howard in Washington, and in talking about the farm, Mr. Howard had said to him: "You know if Mr. Bonsal had bought the place last fall, you would have been entitled to a commission of seventeen hundred and fifty dollars." In the latter part of August, 1912, the appellee and his wife spent the night at Mr. Howard's at Kennebunkport, Maine, and the appellant then told him positively the farm was not for sale. In October the appellee learned that the appellant had sold the farm to Mr. Bonsal and wrote a letter claiming he was entitled to the commission. The following is the letter in reply to that claim:

"October 21, 1912.

"*Dear Rush:*

"By what process of reasoning you can reach the conclusion that I am indebted to you for any service in the recent sale, is beyond my comprehension. I had not intended replying to your note, as your contention seemed ludicrous; but I have no desire to be discourteous or unkind. Now, Rush, I shall be brief and to the point. You had no more to do with the sale of Verdant Valley than a jack rabbit, and this you know as well as I do. A year or more ago the property was withdrawn for sentimental reasons, and I never expected to offer it again. Had it been sold at that time the chances are 2 to 1 that Mr. Bonsal would not have been the purchaser, and therefore you lost nothing by the withdrawal.

"I find among my letters, a copy of one written to you in March, containing the following: 'Verdant Valley Farm is not on the market. The understanding between us and others on a 5% basis is over. If, in the future, the spirit moves me to dispose of this property, I shall stipulate that the sum of \$500 be compensation to the agent who brings me a purchaser. I make this statement, Rush, to avoid any possibility of a misunderstanding.' Have I ever asked you or ever remotely hinted that I would like you to interest yourself in the matter? Most emphatically no. Then, how in heaven's name can you have the nerve, or rather gall, to ask recognition in the deal? You are dead wrong, old fellow. Get it out of your system, and believe me, with kind regards,

"Yours truly,

"B. R. HOWARD."

The price paid, forty-seven thousand dollars, included the personalty. There was a reduction made in the original price, but this was taken off of the personal property, the real estate being sold for thirty-five thousand, the price placed on it with the appellee.

The appellant testified that several people besides Mr. Bonsal were interested in the property, he having advertised it for sale in the papers. Mr. Bonsal had impressed him with the idea he might buy it, although he did not know anything about his financial condition. A man from Harrisburg, by the name of Strayer, was also negotiating for the place. In response to a question as to how far negotiations had gone with this man, the appellant answered: "He had been down several times and seemed very well pleased, and I was certain that he or Mr. Bonsal would get it. Mr. Bonsal said if I would wait a bit he would handle it. I liked Mr. Bonsal very much from the time I met him. I did not know Mr. Strayer, and I was altogether inclined for Mr. Bonsal to have it if he could possibly make it." He further testified that for sentimental reasons he decided not to sell,

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and wired Mr. Bonsal, withdrawing the property, fearing he would hear the next day from Mr. Bonsal, accepting the terms. He decided later to sell and re-opened negotiations with Mr. Bonsal again about the middle of July, 1912, and completed the sale on the 15th of October, 1912. It was a conceded fact that between the time of withdrawal and the day of sale, the appellee did nothing towards bringing about the sale, other than what had been done by him previously.

The question of when and under what circumstances a broker is entitled to commissions for his efforts in procuring or attempting to procure purchasers for real estate has been the subject of a great deal of litigation, both in this State and elsewhere. Under the facts in this case the appellant contends that the appellee cannot recover unless there is evidence of bad faith upon the part of the appellant in withdrawing the authority to sell from the appellee, and argues there is no evidence of such lack of good faith to submit the case to the jury. The appellee argues that under the decisions of this State the question of good faith is not the test of the right of recovery, but that if the appellee was the procuring cause of the sale, that then he is entitled to recover, notwithstanding the agency had been revoked. This contention is based upon the decisions of this Court in *Keener v. Harrod*, 2 Md. 63; *Jones v. Adler*, 34 Md. 440; *Attrill v. Patterson*, 58 Md. 226, and *Blake v. Stump*, 73 Md. 160. It is argued that the principle contended for is established by the following language in the opinion of *Keener v. Harrod*, *supra*, and substantially followed in the other above cited cases and in many more which we could cite. The Court said: "We understand the rule to be this (in the absence of proof of usage), that the mere fact of the agent having introduced the purchaser to the seller or disclosed names by which they came together, to treat, will not entitle him to compensation; but if it appears that such introduction or disclosure was the foundation on which the negotiation was begun and conducted and the sale made, the parties cannot afterwards, by

agreement between themselves, withdraw the matter from the agent's hands, so as to deprive him of his commission." And in *Livezey v. Miller*, 61 Md. 336, it was said: "It is well settled by the authorities generally, and in this State, that a broker is entitled to his commissions if the sale affected can be referred to his instrumentality. It is also the established law that, after negotiations, begun through a broker's intervention, have virtually culminated in a sale, the agent cannot be discharged, so as to deprive him of his commissions. If the agent is the procuring cause of the sale made, he will be awarded his commissions." The construction sought to be put upon the language of these cases by the appellee, completely ignores the rule of law applicable to the right of a principal to revoke the authority of his agent. In the case of *Attrill v. Patterson*, 58 Md. 250, quoted and approved in *Smith v. Dare*, 89 Md. 51, it was held that "as a general rule an agent's authority to act for his principal is always recoverable at the will of the principal by withdrawing his authority, unless the authority be coupled with an interest, or has been conferred on the agent for a valuable compensation moving from him to the principal;" and that "an authority coupled with an interest" is an "interest in the thing itself on which the authority is to be exercised, and not an interest in that which is to be produced by the exercise of the power." It is plain, under the decisions, that the authority in this case was not one coupled with an interest, nor conferred for a valuable consideration. If then the principal has the right to revoke the agency, the correct interpretation of the above cited cases establishes no more than that where facts show a sale made by the principal to have been the result of the agent's efforts, the agent cannot be deprived of the commissions agreed upon if it is established that the purpose of the principal was to avoid the payment of the commissions by withdrawing the authority before the sale was actually consummated. In other words, in such an agency as here, the principal had the absolute right to with-

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draw the authority before the sale was made, and if afterwards he availed himself of the efforts of the agent and made the sale to the agent's customer he is not liable to the agent for commissions unless his withdrawal was made in bad faith towards the agent. *Rees v. Pellow*, 97 Fed. Rep. 167; *Cadigan v. Crabtree*, 186 Mass. 7; *Smith v. Kimball*, 193 Mass. 582. Taking the facts of this case as conceded, the withdrawal of the property took place in October, 1911; negotiations were not re-opened with the purchaser until July, 1912—at least nine months afterwards. Can there be any rule which prevents a party from selling his property to one who had become interested in it by an agent whose authority had been subsequently terminated in good faith, and when under the terms of the contract the right to terminate at will existed? If such authorities exist, we have been unable to find them, but, on the contrary, all we have examined make the question of the good faith of the principal at the time of the termination of the agency, the test of the agent's right, together with the question of the procuring cause. The fact that the ultimate purchaser is the same person interested by the former agent does not affect the question of commissions, provided the withdrawal of the property by the principal from the agent's hands was not with the idea of saving the commissions for himself. If the principal was moved by such a purpose then, of course, he should not be allowed to accomplish it. We are, therefore, of the opinion that the contention of the appellant is correct, in that, there must be evidence of bad faith upon the part of the principal to entitle the appellee to recover; but we are also of the opinion that the facts in evidence were sufficient, if believed by the jury, to warrant it so finding. All other contentions made presented questions of fact for the jury and were properly left for its determination.

What we have said as to the question of good faith, will necessitate a reversal of this judgment because of error in the first prayer of the appellee. The reporter will please set out this prayer in the report.

It will be seen that this prayer is predicated upon the theory that the appellee is entitled to recover notwithstanding the appellant wrote the letter of withdrawal in good faith. After what we have already said, it is not necessary to say anything more than to add that this was erroneous. He was not entitled to recover unless the jury found in addition that the withdrawal was in bad faith. It is true that the prayers of the appellant stated this principle correctly and clearly, but we cannot hold that the effect of this wrong prayer was corrected by them. It has occasionally been held by this Court that the misleading effect of a prayer had been corrected by one of the opposite party. See *Robinson v. Silver*, 120 Md. 41, for a review of the cases. But in such a serious error, we could hardly extend the exception, for we can but think the jury could have been misled.

We are also of the opinion that the expression used in this prayer, "further find that the efforts of the plaintiff were efficient in bringing about the sale," is a too broad statement under the authorities. Some authorities use the term "procuring cause," while others use "efficient cause;" but by saying that "if the efforts were efficient in bringing about the sale" would have permitted the jury to declare the defendant liable no matter to what degree those efforts may have been efficient.

The second prayer of the appellant was properly refused and especially so for the reason that it makes the question of the good faith of the appellant refer only to the time of placing the property again on the market when it should refer in point of time to the time when it was withdrawn. The fourth prayer from its phraseology was very misleading, in that, although by the latter part, it required the jury to find the good faith of the appellant in withdrawing the property, nevertheless in the earlier part it denies the right of the appellee to recover without reference to the question of good faith. The substance of this prayer was saved to the appellant by the granting of his third and fifth prayers. We might here refer to the emphasis attempted to be placed upon the

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assent of the appellee to the withdrawal, and appearing in all the prayers of the appellant. The assent, so called, as appearing in the testimony could have no effect one way or the other upon the right of the appellee to recover.

The first exception arose over asking Mr. Bonsal on cross-examination the following question: "I would ask you whether or not it is a fact you secured a reduction in the price which Mr. Howard was asking for the property on the ground that in making the sale to you without the intervention of a broker he would save broker's commissions?" Upon objection, the defendant offered to prove in response to this question, "that pending his negotiations with the defendant for the purchase of the Verdant Valley Farm, the witness asked for a reduction of the price of the same below the price demanded by the defendant, on the ground that the defendant by dealing direct with him without the intervention of a broker, would save commissions on the sale, and that the defendant, in consideration thereof, and of the assurance by the witness that plaintiff had not induced him to make the purchase, reduced the price by the sum of \$1,500, and sold the property to the witness on the basis of such reduction." The fact that the appellant took the negotiations into his own hands, and changed the terms, could not affect the agent's right to commissions, provided he was the procuring cause of the sale. *Leupold v. Weeks*, 96 Md. 280. Neither could the belief of the seller that he was not liable for the commissions affect any issue in the case. He might well have had this belief and acting under it, made a material reduction in the price and still have been liable, if the discharge of the agent had been for the purpose, as we have above said, of relieving himself from payment of commissions.

The second exception was to the refusal of the Court to permit an answer to the following question asked on cross-examination of the same witness: "State whether or not you did not say to Mr. Howard, subsequently to your purchase of the property, that the plaintiff in no way interested or in-

fluenced you in the deal for the purchase of said property?" We think this question was proper and should have been allowed to be answered, and there is direct authority for it in *Attrill v. Patterson, supra*, where this Court said: "But that could be rebutted (evidence as to whether the plaintiff was the procuring cause) as was done in *Earp v. Cummins*, 54 Pa. St. 396, where the purchaser (who the Court said, if anybody knew, must know) testified he was not influenced at all in making the purchase by the agent."

The third and fourth exceptions were to the refusal to permit answers to the following question put during the cross-examination of the same witness, Bonsal: "In the fall of 1911, you were not in a position to buy. When did you get in a position to buy and under what circumstances did you come to be in a position to buy?" This witness had already testified, under cross-examination, that prior to, and at the time of the withdrawal, he was not in a financial condition to purchase the property. That this testimony was proper, no question was raised, or we take it, could be raised. One of the conditions of the right of an agent to recover commissions is that he must have found a purchaser in a situation, and ready and willing to complete the purchase. *Carrington v. Graves*, 121 Md. 567. This ability to purchase being one of the questions to be determined from the facts, should always be the subject of examination. It may have been a suspicious circumstance to the minds of the jurors that a person who had just testified he was unable to purchase a property in the fall of 1911, yet in the fall of 1912 had purchased the same property, together with twelve thousand dollars worth of personal property, at forty-seven thousand dollars. In our opinion, the further inquiry was proper. It is true as argued that the sale, according to the appellant was not broken off in 1911 because of financial inability of the proposed purchase, for he testified to an entirely different cause; and further, that he thought a sale was so near that he telegraphed Mr. Bonsal the withdrawal; and Mr. Bonsal testified he never disclosed to the appellant his financial inability. These were

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facts, together with the later purchase, from which the jury could have reached the conclusion that the purchaser was originally capable.

The fifth exception was to the refusal to permit an answer to a question asked the appellant: "In July, 1912, when you decided that you would put the property on the market again, state to the jury whether you had any idea at that time that Mr. Street had any claim for commissions on you?" The contention of the appellant is that this was a proper question under the authority of *Phelps v. George's Creek, etc.*, 60 Md. 536, as bearing upon the question of the good faith of the appellant in revoking the agency and subsequently placing the property on the market again. That case is authority for the principle that where the fact to be established is the intention with which an act has been done, to which act, as a matter of law, no conclusive presumption attaches, the party whose intention is the subject of inquiry may testify to the nature of his intention as he might to any other material fact. The question here does not in our opinion come within the rule. At the time of revocation, the thought in the mind of the appellant may have been to avoid the payment of commissions, and yet at the time of re-opening negotiations with Mr. Bonsal have had no idea that the appellee could have any claim against him. The question does not go to the intention of the appellant at all, but rather to his opinion as to what rights the appellee might have had as growing out of their previous relations.

The rulings on the remaining exceptions, sixth and seventh, were not seriously pressed, but we think the rulings thereon were correct. The questions could have had no bearing upon the question of the good faith of the appellant.

*Judgment reversed and new trial awarded,
with costs to the appellant.*

EMMA V. LYON

vs.

MAYOR AND COMMON COUNCIL OF HYATTSVILLE.

Equity pleading: cases on bill and answer. Municipal corporations: power—to assess the cost of public improvements; “front foot” rule; no preliminary hearing; no “taking of property” within constitutional prohibition. Notice.

Where a case is submitted on bill and answer, the answer must be taken as true, in so far as it is responsive to the bill.

p. 308

The purpose of Chapter 79 of the Acts of 1908 was to give the Town of Hyattsville the power to extend the sewerage system, and did not confine it necessarily to merely adding to the length of the old sewer constructed in 1904.

p. 309

The Legislature has the power of taxing particular districts for local benefits or improvements; and to authorize municipal corporations to open, pave, grade, curb, etc., any street or part of street, and to assess the cost of such work upon the property binding upon such street or part thereof. And in the absence of any declaration of intent to the contrary, the presumption is

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Syllabus.

that the Legislature considered that the purpose of such taxation or assessment was a public purpose, and that the improvement would inure to the special benefit and advantage of the owner of the adjacent property, upon which the assessment was laid.

p. 311

Acts of the Legislature, authorizing the assessment for such benefits according to what is called the "front foot" rule are within the constitutional right of the Legislature, even though no provision is made for any preliminary hearing as to benefits; such assessment does not constitute a "taking of property without due process of law."

pp. 311-313

Where real property belonging to a married woman was for years assessed upon the tax books in the name of her husband, and the taxes paid by him, and where a notice of improvements, for which the abutting property was to be assessed, was sent to him, and he attended all the meetings in reference thereto, and was advised of the amount that was to be charged to the property that was assessed in his name, and where he, being an engineer, offered to prepare and draw plans for the improvement, it cannot be contended that the wife, the owner of the property, had no notice of the contemplated improvement.

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Decided February 10th, 1915.

The facts are stated in the opinion of the Court.

Appeal from the Circuit Court for Prince George's County.
(In Equity.) (BEALL, J.)

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Wm. J. Neale and H. B. Moulton submitted a brief for the appellant.

Vincent A. Sheehy, for the appellee.

Boyd, C. J., delivered the opinion of the Court.

This is an appeal from a decree of the lower Court denying an injunction and dismissing the bill of complaint filed by the appellant against the appellee. The bill alleges that the plaintiff (appellant) is the owner of a tract of land in Hyattsville, beginning on the west side of the Washington and Baltimore Turnpike, now known as Maryland avenue, at the middle of Arundel avenue, and running thence west along said middle of that avenue 358 feet; thence north, at right angles to said avenue, 378 feet to the middle of Calvert avenue; thence east along the middle of Calvert avenue, and parallel with Arundel avenue, 410 feet to the west side of the turnpike, or Maryland avenue; thence south $8\frac{1}{3}$ degrees west along said turnpike or Maryland avenue 110 feet to a corner; thence south 7 degrees along the west side of said turnpike 274 feet to the beginning, and that said property is improved by a dwelling house and other improvements. The object of the bill is to prevent the collection of an assessment of \$269.38 against the plaintiff's property for a sewer that was built by the defendant (appellee) and to have said assessment set aside and declared void.

An order to show cause why the injunction should not issue was passed, and an answer was filed by the appellee. The case was submitted on bill and answer, and hence the answer must be taken as true so far as responsive to the bill. *Miller's Eq. Proc.* 317-322, 686. The brief of the appellant relies mainly on the claim that the assessment by the lineal foot is a taking of private property without due process of law and a violation of the Fourteenth Amendment to the Federal Constitution, but as other questions are suggested, we will consider them also.

1. Under the Act of 1904, Chapter 125, the Mayor and Common Council of Hyattsville was authorized to establish, construct and maintain a sewerage system for the town and to issue its bonds to an amount not exceeding \$30,000.00. That sewer was only constructed on Maryland avenue as far north as Arundel avenue. By section 15 of Chapter 79 of

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Acts of 1908, the corporation was given "authority to extend the water mains and sewers as the interest of the town from time to time in its opinion demands, assessing upon the land abutting such extensions the cost thereof, which assessment shall be a lien upon such abutting property, to be assessed at such time as the Mayor and Common Council may determine, and to be collected from the owners of said abutting property by said Council as taxes due the corporation of Hyattsville are collected, and the Mayor and Common Council to have power to make all necessary regulations as to the notice of such assessments to the property owners." Under the authority of that Act ordinances were passed for the construction of the sewer in question, and there was an assessment of \$269.38 on the property of the appellant, but it was assessed in the name of her husband, W. C. Lyon. That sewer was constructed on Maryland avenue to Carroll avenue, which is north of Arundel avenue, and then out Carroll avenue. It runs 366.50 feet in front of the appellant's property on Maryland avenue.

The appellant contends that this was not an extension of the present sewerage system, and that the town was only authorized to extend the sewer of 1904 from some point at which it ended. We will content ourselves by quoting from the opinion of JUDGE BEALL as to that ground. He said: "Manifestly the law meant to give the town the power to extend the sewerage system of the town, and did not mean to confine it necessarily to adding to the length of the old sewer constructed under the Act of 1904. The purpose of the Act was to enable the town to meet the growing demands of increasing population by reaching portions of the town with sewers as it became built up."

2. The second reason assigned is equally without merit. It is contended that the new sewer is in part a duplication of an existing one, and that there was no authority for such construction. It is true that for some distance south of Arundel avenue the new sewer is parallel with the old one

on Maryland avenue, but the answer effectually disposes of that objection. In the first place it denies that such duplicate sewer was in front of the appellant's property, or that said property was in any way affected thereby, or that appellee has attempted to assess any part of the costs of such duplicate sewer against the appellant's property or any other property, but it alleges that the duplication was owing to the existing conditions. In order to have a proper grade in the extension of the sewer on Maryland avenue, north of Arundel avenue, it was necessary in the opinion of the engineer in charge to begin south of Arundel avenue, and it was begun about midway between the latter and Maple avenue. After the sewer of 1904 was laid the State Roads Commission had taken over Maryland avenue and had macadamized it and made a first-class roadway out of it. The appellee found upon investigation that it would be cheaper to run a parallel sewer for the distance spoken of than to tear up the road, place the old sewer deeper and then repair the road. It therefore laid that part of the new sewer on the side of the avenue, where it was not macadamized, which was undoubtedly proper and cheaper, if the allegations in the answer are correct, as we must assume them to be.

3. In reference to the reason assigned that the property of the appellant is not benefited by the construction of the sewer it would perhaps only be necessary to refer to the case of *Hyattsville v. Smith*, 105 Md. 318. JUDGE BURKE, in speaking for the Court, after referring to certain fundamental maxims in the law of taxation, stated by JUDGE COOLEY, said: "Two others, which have been long and firmly fixed in the law of this State, may be added; first, that the Legislature has the power of taxing particular districts for local benefits or improvements; and, secondly, to authorize a municipal corporation to open, grade, pave, curb, etc., any street, or part of a street, and to assess the cost of doing such work upon the property binding upon such street or part thereof, and that in the absence of any declaration of

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intent to the contrary, the presumption would be that the Legislature considered that the purpose for which the tax or assessment was levied was a public purpose, and that the improvement would inure to the special benefit and advantage of the adjacent owner upon whose property the assessment is laid." A number of Maryland cases are then cited by him, and we would also refer to *Bassett v. Ocean City*, 118 Md. 114; *Alberger v. Baltimore*, 64 Md. 1; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; 4 *Dillon on Municipal Corporations* (5th Ed.), 2522.

4. The next objection is that the assessment of the cost of the sewer upon the abutting property, according to the frontage of each parcel, is a taking of private property without due process of law and contrary to the fourteenth amendment to the Federal Constitution. In *Hyattsville v. Smith*, *supra*, we sustained an assessment made according to the front foot rule under a section of the charter of Hyattsville very similar to the one under which this improvement was made, as we also did in *Bassett v. Ocean City*, *supra*, and *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1. Unless therefore the appellant is correct in his contention that the Supreme Court of the United States has decided otherwise, the question is settled in this State.

The case relied on by the appellant is *Norwood v. Baker*, 172 U. S. 269. While there are expressions in that case which might seem to sustain the position of the appellant, the Supreme Court has explained that decision and has pointed out that it was not intended to adopt the rule which some courts thought it had established. In *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, the case of *Norwood v. Baker* was referred to at some length, and a number of authorities were considered, and it was held that (quoting from the syllabus): "The apportionment of the entire cost of a street pavement upon the abutting lots according to their frontage, without any preliminary hearing as to benefits, may be authorized by the Legislature, and this will not constitute

a taking of property without due process of law." The Court, quoting from and approving *Dillon on Municipal Corporations*, said: "The Courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it. * * * Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is according to the present weight of authority considered to be a question of legislative expediency. (2 *Dill. Mun. Corp.*, section 752, 4th Ed.). This array of authority was confronted in the Courts below, with the decision of this Court in the case of *Norwood v. Baker*, 172 U. S. 269, which was claimed to overrule our previous cases, and to establish the principle that the cost of a local improvement can not be assessed against abutting property according to frontage, unless the law, under which the improvement is made, provides for a preliminary hearing as to the benefits to be derived by the property to be assessed. But we agree with the Supreme Court of Missouri in its view that such is not the necessary legal import of the decision in *Norwood v. Baker*." Then, after referring to *Norwood v. Baker* at some length, the Court said: "That this decision did not go to the extent claimed by the plaintiff in error in this case is evident, because in the opinion of the majority it is expressly said that the decision was not inconsistent with our decisions in *Parsons v. District of Columbia*, 170 U. S. 45, 56; 42 L. Ed. 943, 947, and in *Spencer v. Merchant*, 125 U. S. 345, 357; 31 L. Ed. 763, 768."

In *Wight v. Davidson*, 181 U. S. 371, the Supreme Court, in considering the case of *Norwood v. Baker*, said: "There the question was as to the validity of a village ordinance, which imposed the entire cost and expenses of opening a

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street, irrespective of the question whether the property was benefited by the opening of the street. The Legislature of the State had not defined or designated the abutting property as benefited by the improvement, nor had the village authorities made any inquiry into the question of benefits * * *. That it was not intended by this decision to overrule *Bauman v. Ross* and *Parsons v. District of Columbia* is seen in the opinion where both those cases are cited, and declared not to be inconsistent with the conclusion reached."

Without quoting from other cases, see *Tonawanda v. Lyon*, 181 U. S. 389; *Cass Farm Co. v. Detroit*, 181 U. S. 396; *Webster v. Fargo*, 181 U. S. 394; *Detroit v. Parker*, 181 U. S. 399; *Wormley v. District of Columbia*, 181 U. S. 402; *Allen v. District of Columbia*, 181 U. S. 402; *Shumate v. Heman*, 181 U. S. 402; *Chadwick v. Kelley*, 187 U. S. 540. Many decisions are collected in the note to *Heavner v. Elkins*, 69 W. Va. 255, as reported in 26 *Am. & Eng. An. Cases*, 655. Assessments levied by the front foot are thus fully sanctioned by the Supreme Court and the cases sustaining that mode decided by that Court were not overruled by *Norwood v. Baker*.

It is said in the brief of the appellant that the cases relied on by the appellee were all from the District of Columbia, and it is attempted to point out a distinction between them and that of *Norwood v. Baker*, but without deeming it necessary to say more as to that suggestion, it will be seen that a number of those cited above were not from the District of Columbia, and the Supreme Court made no such distinction. An extended review of the Supreme Court decisions can be found in 4 *Dillon on Mun. Cor.* (5th Ed.), section 1436, where the late cases are cited in the notes. Inasmuch, then, as we find nothing in the decisions of the Supreme Court to cause us to change our decisions on the subject, and as the latter have distinctly placed this Court in the line of cases sustaining the front foot rule, it is clear that the injunction could not have been granted upon the ground now under consideration.

It may be well to add that the answer and the ordinance assessing the costs show that only one-half of the cost of the sewer on Maryland avenue in front of the appellant's property was assessed against it, and that there is no occasion to collect by general taxation any portion of the cost of constructing the sewer or to use for that purpose money in its treasury placed there for other purposes. It is also distinctly alleged in the answer that the plaintiff's property is specially benefited by the sewer.

5. The objection that no notice was given to the appellant of the meeting of the Mayor and Common Council for the purpose of making an assessment of the cost of constructing the sewer upon the abutting lands is, under the circumstances shown by this record, wholly without merit, and the bill fails to disclose material facts in reference to that question. The answer shows that this property had been carried on the tax record of the appellee in the name of W. C. Lyon, the husband of the plaintiff, for at least thirteen years, and that during that period the taxes have been paid thereon by him and in his name, upon bills rendered without objection or inquiry by the plaintiff. It is further alleged that all of the property owners, except the owner of the property now claimed by the appellant, abutting on Maryland avenue, from Arundel avenue to Carroll avenue, and on Carroll avenue to Cecil avenue, filed a petition with appellee to have the sewer constructed; that several informal conferences between the property owners and the Mayor and Common Council were held, at which the necessity for such sewer, the size thereof, character and best method of constructing the same were discussed; that as the result of the conferences the Mayor and Common Council became convinced of the necessity for such sewer and in order that it might be taken up in a formal way and in due order, although not required by law, notice was sent to all the owners whose names appeared upon the tax records that the Mayor and Common Council would on the day named hear the property owners upon the questions of the necessity for and size of such a sewer, and that on

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that day the property owners appeared and before any action was taken every property owner who desired to be heard was heard. An ordinance was duly passed and the sewer constructed. The Mayor and Common Council afterwards directed notices to be sent, in accordance with the terms of the original ordinance, to the owners of lands abutting said sewer, that they would meet at a time and place named for the purpose of making an assessment of the costs, and notice was sent to each of the property owners appearing upon the tax records of said town; that at the time and place appointed certain property owners, including W. C. Lyon, were present and the total costs, the number of front feet liable to be assessed and the cost per front foot were all explained to them and every one desiring to be heard was heard, but not a dissenting voice was raised. An ordinance making the assessment was afterwards passed. It is further alleged that at all of the conferences, with the exception of possibly one or two, W. C. Lyon was present, took part in the discussions and, being a civil engineer, at one of the conferences offered to prepare a plan for the construction of said sewer; that all of the notices were therefore sent to him and that at no time did he intimate that he was not the owner of the property; that the plaintiff and her said husband reside together in Hyattsville, and the sewer was constructed in front of their place of residence. The answer further avers that she well knew and was fully advised as to the proceedings being taken by the defendant, and that, if she be in fact the owner of the property, she knew that her husband was present at said meetings, and was so present as her agent and representative and she is now estopped to deny it. The assessment was "On that part of the Killian tract fronting 366.50 feet on Maryland avenue, and assessed in the name of W. C. Lyon, \$269.38," and the bill for the amount of the assessment, which was sent to W. C. Lyon, was filed by the plaintiff with her bill of complaint—being another circumstance to show that she was kept informed as to what was being done in reference to the sewer.

Under such circumstances, there being no denial of the averments in the answer, which has the effect stated above, inasmuch as the case was heard on bill and answer, the plaintiff cannot be granted relief in a Court of Equity on the ground that the assessment was not made in her name, or that the notice was not sent to her. The assessment was in fact made against the property, which was correctly stated to be assessed in the name of W. C. Lyon. If authorities be necessary to show that such objection to assessments for local improvements will not under such circumstances be countenanced by Courts of justice, see *Wilkins Co. v. Baltimore*, 103 Md. 293; *Moffat v. Calvert Co.*, 97 Md. 266; *Parsons v. District of Columbia*, 170 U. S. 45; *Wight v. Davidson*, 181 U. S. 377; *Chadwick v. Kelley*, 187 U. S. 540; *In Re McLean*, 138 N. Y. 164; *Atkinson v. Newton*, 169 Mass. 240; *Stettler v. East Rutherford*, 65 N. J. L. 528; 10 *Am. & Eng. Ency. of Law* 230; 25 *Ibid.* 1205.

We do not deem it necessary to consider the additional question suggested by the appellee—whether under this statute any notice was required before the assessment was made. We are of the opinion that the lower Court was right in refusing to grant an injunction, and as there was no reason for retaining the bill, it was properly dismissed.

Decree affirmed, the appellant to pay the costs.

Md.]

Syllabus.

THE MANUFACTURERS AND MERCHANTS
COMPANY*vs.*JULIUS E. PYLES AND JOSEPH B. MITCHELL,
RECEIVERS.

*Corporations: dissolution; title; receivers; trustee in mortgage;
right to make sale; appeal. Receivers:
possession for the court.*

By section 79 of Article 23 of the Code, upon the dissolution of a corporation by the decree of any court, its property vests in the receivers appointed by the court; but when the corporation has executed a mortgage, etc., or where there is a power of sale, etc., in any mortgage, then (unless with the written consent of the other parties in interest) the receivers shall be authorized to sell only the equity of redemption * * *. In such a case, instead of appealing from the order appointing the receivers, a mortgagee in such a case should appeal for permission to sell the property, and from the court's refusal of such right, an appeal will lie. p. 322

In general, unless it appears by the record that the appellant was injured by the order appealed from, the appeal will be dismissed. p. 322

The possession of the receivers is the possession of the court that appointed them. This appointment does not disturb or divest the lien of the mortgage. p. 322

Decided February 10th, 1915.

Appeal from the Circuit Court of Baltimore City.
(SOPER, C. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Carville D. Benson and D. List Warner, for the appellant.

J. Edward Tyler, Jr (with whom were *Lawrence J. McCormick* and *Edwin W. Wells* on the brief), for the appellees.

BURKE, J., delivered the opinion of the Court.

On the 26th day of June, 1913, the Julius E. Pyles, Incorporated, a corporation engaged in the construction of buildings, entered into a contract under seal with the board of trustees of the Shiloh Baptist Church, to erect upon a percentage basis a new church at the northwest corner of Clinton avenue and George street in Baltimore City. It agreed to take down the old church building, and to furnish the necessary labor and materials for the erection of the new church, and to complete the same as speedily as possible. Payment was to be made by the church bi-weekly as the work progressed.

On the 18th of February, 1914, the contractor filed a bill against the church in the Circuit Court for Baltimore City, in which, among other relief, it asked for the appointment of a receiver for the church property. On February 21, 1914, it filed an amended bill in which it made five new defendants to the suit, viz: Shiloh Baptist Church, Incorporated; The Ardmore Land and Supply Company, a body corporate; Martin L. Weisman, individually; Whit H. Allen, individually, and The Manufacturers and Merchants Company, a body corporate. Five of the defendants demurred to the bill, and on June 15, 1914, the Court sustained all the demurrers, and granted leave to the complainant to file an amended bill.

On June 25, 1914, an amended bill was filed, which, after stating the contract between the complainant and the church, charged in substance as follows: That it had entered upon the performance of the work under the contract, and had

Md.]

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done three-fourths of the construction work upon the church building; that the estimated cost of the new church was \$17,985.27; that it had spent in construction \$13,156.51, and had been paid on account of said work \$3,466.60, leaving a balance then due of \$9,689.75, or more than half of the estimated cost of the building. That the church being for a long time in default in its payments under the contract, and having declared its inability to make the payments, the complainant temporarily suspended construction in order to give the church an opportunity to perfect its financial arrangements. It is then charged that after the work had been suspended for the reason stated, the complainant discovered that the church had entered into a contract with The Ardmore Land and Supply Company to complete the work in total disregard of its rights; that the contract with The Ardmore Land and Supply Company was a pre-arranged plan to defraud the complainant, and that as a part of said plan the church, claiming that it had never been properly incorporated, executed a deed to The Shiloh Baptist Church for the lot upon which the building was being erected, and that Whit W. Allen, the grantor of The Shiloh Baptist Church of Baltimore City, joined in the execution of said deed.

It is then charged "that in furtherance of said fraudulent plan the said The Shiloh Baptist Church, Incorporated, did on or about the 19th day of February, 1914, execute a mortgage to the defendant, The Ardmore Land and Supply Company, in the amount of ten thousand (\$10,000) dollars, which mortgage was in express terms given only for the purpose of raising money to complete said building, from its stage of completion to which it had been brought by your orator to that of a fully completed building, which mortgage has been previously filed in the above entitled case and is prayed to be taken and considered a part of this supplemental bill of complaint, and that on the 19th day of February, 1914, the said, The Ardmore Land and Supply Company, assigned by short assignment, the said mortgage above mentioned to The Manufacturers and Merchants Company, a copy of which

assignment has heretofore been filed in this case and is prayed to be taken and considered as a part of this supplemental bill of complaint. That said mortgage of ten thousand (\$10,000) dollars is given to complete a building which your orator estimates, as is shown above, will cost less than five thousand (\$5,000) dollars;" that this mortgage made no provision for paying the complainant the amount due it for the work done, and that the equity of redemption is grossly inadequate to pay the complainant and other creditors, and that said mortgage was executed after the original bill had been filed, and that the mortgagee and its assigns have taken their title *pendente lite*, and that the title depends upon the result of this case.

It is further alleged that the church is totally and absolutely insolvent and has admitted its insolvency to the complainant, and that the giving of the mortgage to The Ardmore Land and Supply Company was in fraud of the complainant's rights; that all construction work on the building had ceased, and the building was in an uncompleted state, and if allowed to remain in that condition would greatly deteriorate, and that there is no one in charge of the property.

The relief prayed for was:

1. That The Shiloh Baptist Church of Baltimore City, a body corporate; The Shiloh Baptist Church, Incorporated; The Ardmore Land and Supply Company, and The Manufacturers and Merchants Company, a body corporate, may answer these amendments.

2. That this Court will pass an order appointing a receiver or receivers to take charge of said property, and hold and preserve the same, and if deemed advisable, to complete said structure, or if not deemed wise, then to sell the said property and to distribute the proceeds of the sale among all of the various parties in interest according to their respective rights and equities and priorities.

3. That the defendant, The Shiloh Baptist Church of Baltimore City, may be adjudged and determined to be insol-

Md.]

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vent and to have surrendered its corporate rights and franchises, and that it be decreed to be dissolved.

The Manufacturers and Merchants Company and The Ardmore Land and Supply Company on July 8, 1914, demurred to the whole amended bill. On July 10, 1914, The Shiloh Baptist Church of Baltimore City, and The Shiloh Baptist Church, Incorporated, answered under oath and stated that since the institution of the proceedings the defendants had become financially involved to a great extent on account of certain outstanding obligations which they were unable to meet in due course, and under the circumstance of this embarrassment, they felt it would be to the best interest of the creditors of the corporation and all parties concerned that a receiver should be appointed to take charge of the assets of the corporation and to administer the same under the jurisdiction of the Court. The same day on which the answer was filed, and without notice to the other defendants and without disposing of the demurrers the Court passed an order appointing Julius E. Pyles and Joseph B. Mitchell receivers, with the power and authority to take charge of the property, subject, however, to the further order of the Court. From this order The Manufacturers and Merchants Company appealed.

The bill was filed, as appears from the above recital of facts, under section 78, Article 23 of the Code for the involuntary dissolution of the corporation. It asked no relief against the appellant's mortgage, and the order appointing receivers did not affect the appellant's rights under the mortgage. It is provided by section 79, Article 23 of the Code, that whenever any corporation shall be dissolved by the decree of any Court of this State, its property shall vest in its receivers appointed and named therein, but when the corporation has executed a mortgage or a deed of trust in the nature of a mortgage, "or if there be a power of sale or a consent to a decree for a sale contained in any mortgage, deed of trust, or deed of trust in the nature of a mortgage, of real or personal property made by such corporation, then

(unless with the written consent of the other parties in interest) the receiver of such corporation shall be authorized to sell only the equity of redemption in the property mentioned in such decree, mortgage, deed of trust, or deed of trust in the nature of a mortgage and, unless such consent be given such decree and the powers of sale contained in such mortgage, deed of trust, or deed of trust in the nature of a mortgage, may be executed as if proceedings against the corporation had not been instituted."

The well-established rule upon the question of the right of appeal from an order of decree in equity is thus stated in *Miller's Equity Pro.*, section 362: "Unless it appears from the record that the appellant has been injured by the decision of the Court below, that decision will not be reversed, even if erroneous as to other parties; because the appellant has no cause of complaint, his rights not being affected. If there is no injury to the appellant, he cannot claim a reversal of the decree to correct an error."

The possession of the receivers is the possession of the Court which appointed them. Their appointment did not disturb or divest the lien of the appellant's mortgage. The receivers hold the property subject to the mortgage, and can sell only the equity of redemption, unless by the written consent of the appellant. His right to sell the property under the power contained in the mortgage or under a decree authorizing a sale of the property is not affected by the mere appointment of receivers. Instead of appealing from the order appointing receivers, the appellant should have applied to the Court for permission to sell the property, and if the Court had improperly refused his application he could have appealed. Upon the record as it stood at the time the appeal in this case was taken, there is no reason to suppose that the Court would have denied him permission to enforce whatever rights he may have had to collect his mortgage. As it does not appear that the plaintiff has been injured by the order appealed from, the appeal must be dismissed.

Appeal dismissed, with costs to the appellees.

Md.]

Syllabus.

THE SCHOOL SISTERS OF NOTRE DAME,
A CORPORATION,

vs.

REUBEN R. KUSNITT, TRADING AS GOODYEAR HOSPITAL
RUBBER COMPANY.

*Contracts: misrepresentation as to who was the vendor; stranger
to contract no right to assume it. Sale of goods: when
merely keeping possession no equivalent to accept-
ance. Baltimore Practice Act: failure to
take judgment for amount admitted
to be due.*

Where the agent of an individual represented to certain vendees that he represented a large corporation, whose name suggested the Goodyear Rubber Company, and as such induced them to sign a contract, as if with such presumed corporation, with which they intended to contract, when as a matter of fact, there was no such corporation existing, there was no contract.

p. 334

In such a case, where the goods were shipped to the vendees before they had found out that no such corporation existed, but the goods never had been opened, and no demand for the goods had been made by the vendor, and there had been no conversion by the vendees, nor refusal to return them, an action of assumpsit by the vendor for the value of the goods will not lie.

p. 342

A person has a right to contract with whom he pleases, and another cannot be thrust upon him without his consent; and he cannot be held to have contracted with a person other than the one he contemplated.

p. 340

In general, one person can not make another his debtor without the latter's consent.

p. 342

Under the Baltimore Practice Act, if the plaintiff fails to take a judgment for the amount that the defendant admits to be due, the defendant is not bound or estopped by his admission in the affidavit to the pleas. p. 341

Decided February 10th, 1915.

Appeal from the Superior Court of Baltimore City.
(STUMP, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Harry M. Benzinger and Henry H. Dinneen, for the appellant.

C. Howard Millikin and Eli Frank (with whom were *German H. H. Emory and C. John Beeuwkes* on the brief), for the appellee.

THOMAS, J., delivered the opinion of the Court.

This appeal is from a judgment recovered in the Superior Court of Baltimore City by Reuben R. Kusnitt, trading as Goodyear Hospital Rubber Company, against the School Sisters of Notre Dame, a corporation, for \$900.00. The suit was on the common counts to which the defendant pleaded that "it was never indebted" and "did not promise as alleged."

Joseph S. Holstein, the only witness for the plaintiff, testified that he was the agent of the Goodyear Hospital Rubber Company and traveled "for them," and that on the 28th of October, 1913, he called at Notre Dame College, on Charles Street avenue, Baltimore, and asked for the Sister Superior. When Sister M. Florentine, the Sister Superior, appeared he exhibited to her samples of rubber goods, and after receiving from her an order for ice bags and water bags he talked with her and another sister about matting for the back stairs of the building. Sister M. Florentine sent for another sister to show him the stairs in order that he might measure them.

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After he measured the back stairs he asked the Sister Superior "why they did not have the other stairs in front done at the same time." And she said "no; she could not afford that at the time." He told her the result of his measurement of the back stairs and the prices of the matting, and she asked him what it would cost, and he replied that he could not tell her, that no rubber man could tell her that in advance, but that it would cost thirty cents a pound. He then wrote the following order or contract which he and the Sister Superior signed:

"GOODYEAR HOSPITAL RUBBER COMPANY,
HARTFORD, CONN.

Goodyear's Famous Rubber Goods of Every Description.

Shipped via Penn. R. R. as soon as possible.

When ship Date Oct. 28, 1913.

1% 10 days net 30 days.

Terms: Subject to sight draft without notice.

Sold to Notre Dame College,

City, Charles St. Ave., State, Baltimore, Md.

All claims must be made
within one day after receipt
of goods or no allowance
will be made.

We, the above named Institution and Purchaser,
Agrees to Take the Following Goods as Specified Below:

1/2 doz. M. W. B.....\$25 per dozen.

1/2 doz. Z. E. P. Ice Bags..... 15 per dozen.

260 pieces 5/16 (3/8) Plain Black Matting 11"x36",
at 30c. per pound.

Special price:

14 pieces 5/16 (3/8) Plain Black Mattings 8"x30",
at 30c. per pound.

12 pieces 5/16 (3/8) Plain Black Mattings 24"x36",
at 30c. per pound.

2 pieces 5/16 (3/8) Plain Black Matting 2"x36",
at 30c. per pound.

1 No. 7 In. Ring, \$1.50 Ea.

Bevel all edges. Send nails.

Frt. to be deducted Off of Bill.

1 Perf. mat. $\frac{1}{2}$ " Thick 3'x3'; name in white N. D. M. as Donation.

No. chg. 1 perf. 5'x3' Notre Dame College; white No Chg. as Donation.

Customers Should Read Contract Over carefully before signing and should obtain a duplicate from Agent. All goods are made special to order and cannot be cancelled under any condition.

N. B.—This contract is binding. when signed by the customer, and the agent accepting same, by signing it binds the Goodyear Hospital Rubber Co.

Name of Institution: Notre Dame College.

Signature of Purchaser: Sr. M. Florentine.

J. S. HOLSTEIN, *Agent.*"

He further testified that he was at Notre Dame College about an hour and a half; that he did not know the name of the Sister Superior until she signed the contract; that the water bottles, ice bags and invalid ring were shipped to Notre Dame College by express and received by the defendant, and that the other goods mentioned in the order or contract were shipped by freight and tendered to the College; that it took 2980 pounds of matting to fill the order which at thirty cents a pound amounted to \$894.00, and that the amount due plaintiff for the goods ordered was \$900.15. On cross-examination he testified as follows: "Q. Who is the Goodyear Hospital Rubber Company? A. The Goodyear Hospital Rubber Company is a concern in Hartford, Connecticut, owned by R. R. Kusnitt. Q. Who did you tell the Sisters of Notre Dame the Goodyear Hospital Rubber Company was? A. I did not make any assertion who it was. Q. Did you tell the Sisters of Notre Dame who you represented? A. Yes; the Goodyear Hospital Rubber Company of Hart-

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ford, Connecticut. Q. Did you tell them what it was? A. A rubber concern. Q. Did you tell the Sisters of Notre Dame at the time plaintiff's exhibit No. 1 (the contract or order for the goods) was signed that the Goodyear Hospital Rubber Company was a large firm or corporation in which you were interested as an officer? A. No, sir; I did not. Q. Didn't you tell them that the reason for your making these remarkable low prices for the goods offered to be sold was because the winter season was approaching and you had a large factory, and in order to keep the men employed during the winter you offered these prices which were virtually cost prices? A. I made the assertion that to keep our factory busy during the winter season, that was the reason I gave for these low prices and it was true; but any factory we buy goods of is our factory. Q. Then, as a matter of fact, at the time you made that statement to the sisters, you did not have a factory did you? A. We call it our factory when we are under contract to buy certain out-put. Q. Did Reuben R. Kusnitt on the 28th of October, 1913, own any factory? A. He did not own a factory. Q. There was no such corporation as the Goodyear Hospital Rubber Company? A. Well, we did not claim that it was a corporation. Q. Did you tell the School Sisters of Notre Dame at the time this contract was entered into that R. R. Kusnitt was the Goodyear Hospital Rubber Company? A. I did not, because I did not deem it was necessary. Q. Did you tell them at that time that you were selling these goods below their real value? A. I did, and so they were. Q. And didn't you tell them that the members of the corporation that you represented would raise a racket with you, but that you would stand for it, or words to that effect? A. I do not recall any such statement. Q. Didn't you tell them that you were selling these goods at that price so as to keep your men employed during the winter season? A. I did." After stating that the three sisters he mentioned were not together when the contract was signed; that it was signed "in triplicate"; that Sister Florentine left

the room while he was packing his goods, and that he left a signed copy of the contract in the room for her, he was shown the following letter which he said was a letter from the Good-year Hospital Rubber Company:

"GOODYEAR HOSPITAL RUBBER Co.,
HARTFORD, CONN.

Goodyear's Famous Rubber Goods of Every Description.

Notre Dame College, November 17th, 1913.
Charles Street Ave.,
Baltimore, Md.

Rev. Sister M. Florentine, Supr.

Dear Madam:

Please find enclosed copy of your contract, which is exactly as the original. This matting is for your stairs in back of building. You will also find enclosed bill of lading for matting shipped today.

Respectfully yours,

GOODYEAR HOSPITAL RUBBER Co.,

RRK/H.

By R. R. Kusnitt, Manager.

Enclosures."

The witness stated that that was the way the plaintiff usually signed; that the goods referred to were shipped from the warehouse of the plaintiff at 46 Village Street, Hartford, Connecticut, and further testified as follows: "Q. That is not your warehouse now? A. No, sir. Q. Who, as a matter of fact, manufactured these goods? A. The Goodyear India Rubber Glove Company of Maggatuck, Connecticut, manufactured part. Q. What part did the Goodyear India Rubber Glove Company manufacture? A. The sundry parts—the ice and water bags and the invalid ring. Q. And who manufactured the other part? A. The people who make the same stuff, the Goodyear—the genuine Goodyears. Q. What is the name of that concern? A. The Jersey Car Spring and Rubber Company of Jersey City, N. J. Q. They manufactured all the matting? A. Yes, sir. Q. Who are the 'genuine' Goodyear Rubber people? A. Well, there

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are 150 Goodyears in the United States; that is an uncopyrighted name. Q. 150 of them in the United States? A. Yes; I guess you could count a thousand. Q. Well, why do you call them genuine if there are one hundred and fifty of them? A. That is too much for me to answer; they are all genuine."

Sister Mary Florentine, when asked to state the circumstances under which she signed the contract, said: "On the 28th of October, 1913, the portress telephoned to my office telling me that there was an agent in the parlor exhibiting rubber goods, or wanted to sell rubber goods. I came over and found Mr. Holstein there, and he showed me some ice bags and water bottles. I thought they would be of use in the infirmary. I sent for the infirmarian, Sister Mortana, and asked her if she would like to have some of them, and she stated that she would like to have one-half dozen of each. He spoke of the matting and told us what it cost. Then he said: 'In the meantime, you are going to take these anyhow, so sign for these.' I signed for the ice bags and water bottles, and so did he. Then Sister Mortana took him to the back stairs, and he came back again, and I don't know whether he told me how many steps there were, but I think there were about 130 to a stair. He said it would be \$1.25 a step. I said: 'Oh, no; we could not spend that much money; it would be about \$300.00,' and he said: 'Oh, no; it will not be more than \$150.00 or \$200.00.' Then I sent for Sister Meletia and spoke to her about it, and she advised not to do it, but he insisted it would not be over \$200.00; so I sent him out with another sister to measure the stairs, and I thought he was about to fill out another paper when I was called out. I returned later and I found him on the way to the door. I went to the portress and asked her whether the man had left a paper for me and she said no." When asked if she got a copy of the order she said, "No, I got no copy; there was no copy left. I looked in the parlor where he was and there was no copy. Then it struck me that perhaps

he had written the order on the same paper which I had signed for the water bottles and ice bags, and I was very much troubled about it, and I wrote a registered letter to be sure that he would get it countermanding the whole order." Plaintiff's counsel was then asked to produce the letter, and he said he had no letter dated October 28th, but produced one dated October 29th, which the witness said was the letter she referred to and which is as follows:

"COLLEGE OF NOTRE DAME OF MARYLAND,
CHARLES STREET AVE., BALTIMORE.

Goodyear Hospital Rubber Co.,
Hartford, Conn.

Gentlemen: This morning a representative of your Company called regarding rubber goods. We gave him an order for $\frac{1}{2}$ dozen ice bags and $\frac{1}{2}$ dozen water bottles.

We also gave him an order for rubber for our *back* stairs. We had no idea that it would cost so much, but since he left we calculated and find it would be more than we can afford to spend for the next two years. We now recall the order for the rubbers for stairs. You may send us the water bags and the hot water bottles, but consider the order for the rubber for stairs cancelled for the present.

We may get it later, but not now.

Very truly,

Oct. 29th, '13."

SISTER MARY FLORENTINE."

Sister Florentine stated that the letter was written on the same day that the contract was signed, and that she received a reply to it from the Goodyear Hospital Rubber Company, but had mislaid it and could not find it. Counsel for the plaintiff produced the following copy of it, which the defendant offered in evidence:

"Hartford, Conn., October 30, 1915.

College of Notre Dame of Maryland,

Rev. Sister Mary Florentine, Superior,

Charles Street Ave., Baltimore, Md.

Dear Madam: We have just received your regis-

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tered letter at 4.15 this afternoon, in which you state that you wish to cancel your order for rubber matting to some date in the near future.

We are very sorry we cannot comply with your wishes, as your order has gone into the works last night and stock is being made up for your contract and will be ready for shipment within a few days, as our factory is working day and night.

You have bought these goods at a very low figure and there ought to be no reason why they should not last as long as the institution does. The matting is guaranteed for twenty-five years.

Thanking you for your kind order and hoping that our business relations will be the same in the future as they have been in the past, we beg to remain,

Respectfully yours,

GOODYEAR HOSPITAL RUBBER CO.,

.....,

Manager."

The defendant then offered in evidence further correspondence with the Goodyear Hospital Rubber Company, in which she asked for a copy of the contract, and then Sister Florentine further testified that after she received the telegram she sent two of the sisters up to Hartford, Connecticut, to make inquiry concerning the company, as she was "very doubtful about it"; that at the time she signed the contract the only items it contained were the one-half dozen hot water bags at \$25.00 per dozen and one-half dozen ice bags at \$15.00 per dozen; that she did not know that the other items were put on that paper, but thought he was putting them on another to be signed; that Mr. Holstein told her that the matting for the back stairs would not cost \$300.00 and perhaps not \$200.00; that there were about 130 steps in each flight of stairs, or about 260 steps in the two flights, and that at first he spoke of the matting costing about \$1.25 a step; that she calculated and saw that it would be about \$300.00, and he said, "Oh, no; possibly 50 or 75 cents each,

and they will not be more than \$200 and possibly only \$150"; that she did not receive a copy of the contract from the defendant until she received the bill for the goods and the bill of lading in the letter of November 17th, 1913; that when the goods arrived by freight she consulted an attorney, who advised her not to receive them, and that she then telephoned to the station and advised the railroad company to return them, and that she thought the railroad company had done so until a few days later when she received a postal from the terminal warehouse saying that the goods were there and would be sold at auction in a few days; that she then called up Camden Station and asked them why they did not return the goods, and they said that they had written to Hartford, but had gotten no answer; that at the time she ordered the goods Mr. Holstein told her that he was a member of the Goodyear Hospital Rubber Company; that he was the only one who could give them the rubber at such reduced rates. and that when he went back to Hartford they would call him down for it; that the reason he did it was because the factory had a great many men and they did not have much to do at that time of the year; that she asked him if the factory was in Hartford, and he said no, it was right outside of Hartford; that she never heard of Mr. Kusnitt, and never heard his name; that Mr. Holstein told her that the Goodyear Hospital Rubber Company was a company—a corporation—of which he was a member, and that she therefore ordered the goods from him. On cross-examination she stated that the School Sisters of Notre Dame is a corporation, and controls and operates the Notre Dame College; that she is the President and Treasurer of the College, and is called the Superior; that the only items in the contract when she signed it were the water bags and ice bags, and when asked if she had received them she said a box came to the college during her absence by express and was received by one of the sisters, probably the portress; that it had never been opened, and was still at the college, and that she had never

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offered to return it to the Goodyear Hospital Rubber Company; that Mr. Holstein told her that the Goodyear Hospital Rubber Company was a company, or a firm, and that he was one of the members, and that it had a factory outside of Hartford; that he said he had a number of men engaged in the factory, and that they did not have much work to do at that season, and that that was the reason he could give her the rubber cheaper; that he said the company had the factory and that it was run by their men and that they paid them; that she could not say positively that he used the word "corporation," but that he did use the word "firm or company." The testimony of Sister Florentine in regard to the circumstances under which the contract was signed by her, and the items it contained when she signed it, etc., was corroborated by the testimony of the other two sisters who were present, and Sister Meletia, who was the Dean and Secretary of the college, further testified that she recollected very positively that Mr. Holstein said that the Goodyear Hospital Rubber Company "was a corporation"; that she inquired about the "peculiarity of the name," and that he said "a corporation had the right to any name that they liked"; that she asked how he could give rates that seemed to her "preposterous," and that he said he was allowed to do that because they "had a big concourse of men, and they were dull at that season, and it was better to get a little something than nothing"; that on November 13th she went to Hartford, Connecticut, taking Sister Mortana with her, to find out about the Goodyear Hospital Rubber Company, "because she felt convinced that there was some chicanery about the transaction, and she thought that if she could meet the president of the corporation she could have an understanding with him"; that she found no institution at all of that name, although she made careful inquiry; looked at the city directory and the telephone directory; went to every shop that had the word "Goodyear attached to it or where rubber goods were sold," inquired at the City Hall and at police headquarters, and asked "the head man at the Post

Office"; that while she was in Hartford she telephoned to Mr. Holstein's house, and spoke to a woman who said she was Mrs. Holstein, and that she told her that Mr. Holstein was in California or Wyoming and would not return for several months; that she asked her if there was not someone to represent him, and that she replied that unfortunately there was nobody in town; that she then asked her if there was not an office or warehouse or some place where she could meet the officials of the corporation, and that Mrs. Holstein replied there was a warehouse, but that it was very dilapidated and in a miserable part of the town.

During the trial the defendant reserved twenty-seven exceptions, the last being to the ruling of the Court below on the prayers and special exceptions to plaintiff's prayers, but in the view we take of the case it will only be necessary to consider one of them.

✱ The evidence to which we have referred at some length shows conclusively that the sisters who made the contract in this case on behalf of the defendant thought they were contracting with and intended to contract with a *company or corporation* which owned a large factory in or just outside of Hartford, Connecticut, and employed a great number of men engaged in the manufacture of goods of the character mentioned in the contract, and it also shows that they were led to so believe by the statements and representations of the witness Holstein. It is true he denies that he said that the Goodyear Hospital Rubber Company was a corporation, but he admits that he told them that he represented a *company* of that name, and does not deny that he told them that the company had a factory just outside of Hartford, where it employed a number of men in manufacturing goods of the kind he offered to sell, and that he was willing to give them the goods mentioned at a reduced rate in order to keep its men employed during the winter season. That there was in fact no such corporation, company or factory, and that the sisters who represented the defendant in the negotiations never knew or heard of the plaintiff in this case until the

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suit was brought, and never intended to contract with him must be conceded.

In *Anson on Contracts* (11th Ed.), sec. 183, the learned author, in speaking of "mistake as to the identity of the person with whom the contract is made," refers to the cases of *Boulton v. Jones* (2 H. & N. 564), and *Cundy v. Lindsay* (3 App. Cases, 459), as follows: "In *Boulton v. Jones*, Boulton had taken over the business of one Brocklehurst, with whom Jones had been used to deal, and against whom he had a set-off. Jones sent an order for goods to Brocklehurst; Boulton supplied them without any notice that the business had changed hands; when Jones learned that the goods had not come from Brocklehurst he refused to pay for them, and it was held that he need not pay. 'In order to entitle the plaintiff to recover, he must show that there was a contract with himself.' In *Cundy v. Lindsay*, a person named Blenkarn, by imitating the signature of a respectable firm named Blenkiron, induced AB. to supply him with goods which he afterwards sold to X. It was held that an innocent purchaser could acquire no right to the goods, because as between AB. and Blenkarn there was no contract. 'Of him,' says Lord Cairns, 'they knew nothing, and on him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind, which could lead to any agreement or contract whatever. As between him and them there was merely the one side to a contract, where in order to produce a contract, two sides should be required.' The result of the two cases is no more than this,—that if a man accepts an offer which is plainly meant for another, or if he becomes party to a contract by falsely representing himself to be another, the contract in either case is void. In the first case one party takes advantage of the mistake; in the other he creates it." In note 2 to page 169, it is said: "The same result follows if the seller is induced to contract with B. on his representation that he is acting as agent for a named person."

Mr. Benjamin in his work on *Sales of Personal Property* (3rd Ed.), section 74, after reviewing the English and American cases, says: "Where a person passes himself off for another, or falsely represents himself as agent for another, for whom he professes to buy, and thus obtains the vendor's assent to a sale, and even a delivery of goods, the whole contract is void; it has never come into existence, for the vendor never assented to sell to the person thus deceiving him." He then refers to certain cases where the contracts were held void, on the ground of fraud, and says, "but they were equally void for mistake." Mr. Brantly in the second edition in his work on *Contracts*, says: "It is well settled that if a man falsely represents that he is the agent of another and thus obtains possession of property, there is no sale and the transaction is void. In this instance the seller intends to contract, not with the person before him, but with a principal, who is either non-existent or has not authorized the contract. There is, consequently, no meeting of minds between the seller and buyer. The offer or declaration of will by the seller is not met by a corresponding will on the part of any buyer, and the offer to sell not being made to the party present cannot be accepted by him." He says also "that where goods are ordered of one person and supplied by another, the latter has no claim against the purchaser *ex contractu* unless he appropriates them after notice of the substitution, in which case he assents to the change." The same rule is expressed in 9 *Cyc.* 401-402, as follows: "Mistake as to the identity of the other party arises where a person contracts with another believing him to be the one with whom he intends to contract, while as a matter of fact it is another person. Here, whether the mistake arises through the other's fraud, as when he falsely represents himself to be another, or accepts an offer which is meant for another there is no agreement. One who enters into an agreement has a right to know with whom he is agreeing, and when a person intends to contract with another he cannot be compelled to accept a third person as the other party to the contract." In *Humble v. Hunter* (17

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L. J. Q. B. 350), LORD DENMAN announces the rule in the statement, "You have a right to the benefit you contemplate from the character, credit and substance of the party with whom you contract," and in *Arkansas Co. v. Belden Co.*, 127 U. S. 379, the Supreme Court says on page 387: "But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of LORD DENMAN, 'You have the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.'" In the case of *Boston Ice Co. v. Potter*, 123 Mass. 28, the Court said: "To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract can be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply he terminated his contract, and made a contract for his supply with the Citizens Ice Company. The plaintiff afterwards delivered ice to the defendant for one year without notifying the defendant, as the presiding judge found that it had bought the business of the Citizens Ice Company, until after delivery and consumption of the ice. * * * There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. *Hills v. Snell*, 104 Mass. 173. And no presumption of assent can be implied from the reception and use of the ice because the defendant had no knowledge that it was furnished by the plaintiff. * * * A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract. * * * In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. * * * If he had received notice and continued to take ice as delivered, a contract would be implied." In the case of *Edmunds v.*

Merchants Transportation Co., 135 Mass. 283, "The swindler introduced himself as the brother of Edward Pape, of Dayton, Ohio. The plaintiffs understood they were selling, and intended to sell, the real Edward Pape," and the Court held that there was no contract with him, because the swindler who acted as his agent had no authority, and that there was no contract of sale made with any one, and that the relation of vendor and vendee never existed between the plaintiffs and the swindler. In the case of *Rodliffe v. Dallinger*, 141 Mass., p. 1, 4 N. E. 805, wool was delivered to a broker with the understanding that it was sold to an undisclosed manufacturer. It turned out that the broker in fact was not acting for the undisclosed principal and the Court held that there was no contract of sale. In the case of *Barnes v. Shoemaker*, 112 Ind. 512, 14 N. E. 367, where the goods ordered by one person were supplied by another, the Supreme Court of Indiana held that the acceptance and use of the goods, without notice that they were so supplied, would not warrant a recovery because "one of the indispensable elements of a contract—the mutual assent of the contracting parties"—was absent, and that to support a recovery for goods sold and delivered, there must be a contract, either express or implied, between the person who ordered and the one who supplied the goods. The cases of *Roof v. Morrisson, Plummer Co.*, 37 Ill. App. 37; *Consumers' Ice Co. v. Webster, etc., Co.*, 32 N. Y. App. Div. 592, and *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184, are to the same effect. In this State the case of *Fifer v. Clearfield Coal Co.*, 103 Md. 1, is directly in point. There the contract was made in the name of the Cambria Coal Co. by one who represented that he was the agent of the company. The defendant was led to believe and thought that the Cambria Coal Co. was a corporation. The evidence disclosed that there was no such corporation. and that the agent in fact represented the plaintiff, Clarence A. Fifer, who was trading as the Cambria Coal Co. In disposing of the case JUDGE PAGE, speaking for this Court, said: "The testimony shows that the contract entered into

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by the appellee was with the Cambria Coal Co., which so far as the record discloses was a fiction, not representing any corporation or association. It is clear from all the evidence that the appellee and its agents, during the whole time the negotiations for the sale of the coal was going on, thought they were dealing with a corporation." After referring to some of the evidence in the case he said further: "It is therefore clear that the appellee supposed it was dealing with a corporation and not with an individual; and furthermore the evidence will show that this belief on its part was induced by the conduct of Deitrich, the agent of the appellant. The law applicable to such a state of facts, is thus stated in *Anson on Contracts*, p. 163, 8th Ed. Mistakes as to the identity of the person with whom the contract is made, 'arise where A. contracts with X, believing him to be M.; that is, where the offeror has in contemplation a definite person with whom he intends to contract.' The author cites in support of this position, the case of *Boulton v. Jones*, 2 H. & N. 564; *Cundy v. Lindsay*, 3 App. Cases, 459. In the latter case where 'a person named Blenkarn imitating the signature of a respectable firm named Blenkiron induced AB. to supply him with goods which he afterwards sold to X. It was held an innocent purchaser could acquire no right to the goods, because as between AB. and Blenkarn there was no contract.' " After quoting the statement of LORD CAIRNS in that case, and citing the case of *Roof v. Morrisson, Plummer Co.*, *supra*, this Court further said: "The author in a note adds, these cases must be distinguished from those where B. deals with A., supposing A. to be acting for himself when in fact A. is acting for an undisclosed principal X.

"Applying these principles to the undisputed evidence in the case, it seems that the appellee was led to suppose that it was dealing with a corporation. * * * It did not intend to contract with an individual, and was misled by Detrich in so doing. There was, therefore, no valid contract between the appellee and the appellant, and the latter cannot maintain this suit."

It is urged on behalf of the appellee that a mistake as to the identity of the party with whom the contract was made only avoids the contract when it is material for one party to know with whom he is contracting and when he has a definite person in view. Of course the mistake does not arise where one of the parties has no definite person in view with whom he intends to contract. As said in *Anson on Contracts*, section 184: "It cannot arise in the case of general offers which any one may accept, such as offers by advertisement, or sales for ready money." But to hold that the rule only applies where the defendant can show that it was important for him to know with whom he was contracting, or that he had a reason for not wanting to contract with the plaintiff, would be to lose sight of the principle upon which the rule rests. If a person has a right to contract with whom he pleases, and another cannot be thrust upon him without his consent, he cannot be held to have contracted with a person other than the one he contemplated. In the case of *Boulton v. Jones*, *supra*, the defendant had a set-off against the party with whom he thought he was dealing, and in the case of *Boston Ice Co. v. Potter*, *supra*, it was urged that the rule should not apply unless there was a similar reason why the contract should not be enforced. In answer to this contention the Court in the latter case said: "The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. * * * The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party." In the case at bar the Sisters who represented the defendant never knew or heard of Reuben R. Kusnitt, but

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thought they were contracting with and intended to contract with a company or corporation engaged in manufacturing goods of the kind they ordered. They had in view a definite person with whom they intended to contract, and as there was no such person or company there was no contract. This is not the case of dealing with an agent, supposing him to be acting for himself. Holstein represented that he was acting for a company or corporation which in fact did not exist.

The cases of *Stoddard v. Ham*, 129 Mass. 383, and *Clement v. British America Assur. Co.*, 141 Mass. 298, 5 N. E. 847, cited and relied upon by the appellee are not in conflict with the Massachusetts cases to which we have already referred. In *Stoddard v. Ham*, the Court said: "It was not a case of mistaken identity. The plaintiffs knew that they were dealing with Leonard; they did not mistake him for the defendant; nothing was said as to any other party to the sale. The conclusion is unavoidable that the contract was with him," and in *Clement v. British America Assur. Co.*, the Court said: "If A. deals with B., without any inquiry as to his identity, and in consequence of the dealing B.'s position is changed, as a general rule A. would be estopped from setting up that he supposed he was dealing with another person, and thus defeating the contract." It is quite apparent that these cases do not depart from the rule adhered to in the other Massachusetts cases referred to, and which applies to a case where the agent leads one to believe that he is contracting with a company or corporation that does not in fact exist.

The suit was brought under the Practice Act in force in Baltimore City, and as the defendant in the affidavit to its pleas admitted the plaintiff's claim to the extent of \$21.50, the appellee contends that it is estopped from denying that it contracted with him. This contention, however, is fully disposed of in the case of *Laubheimer v. Naill*, 88 Md. 174, where this Court held that if the plaintiff fails to take a judgment for the amount admitted to be due, the defendant is not bound by his admission in the affidavit to his plea.

It is conceded that the express package containing the water bottles, ice bags and invalid ring, amounting to \$21.50, was received by the defendant. But at the time the defendant received the package it did not know that it had been shipped by the plaintiff, and the evidence shows that it has never been opened and is still at the College. So far as the record shows there has been no demand by the plaintiff for these goods, and no conversion of or refusal to return them. As the defendant did not order or contract to purchase them from the plaintiff, and did not know, when they were received, that they had been furnished by him, there was no express or implied contract to pay for them, unless we are to hold that one person can make another his debtor without the latter's consent. In *Randolph Iron Co. v. Elliott*, *supra*, the Court held that where goods come into the possession of the defendant under such circumstances, assumpsit cannot be maintained unless the plaintiff shows that there has been a subsequent demand and a refusal or conversion of the goods. If the defendant had received the goods with the knowledge that they had been shipped by the plaintiff, or had appropriated them to its use after notice that they were furnished by him, or upon demand by the plaintiff had refused to surrender them a very different principle would apply. But the mere fact that they are in the possession of the defendant under the circumstances disclosed by the record does not impose upon it the burden of returning them, or establish an implied contract to pay for them.

It follows from what we have said that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, and that the defendant's third prayer should therefore have been granted.

*Judgment reversed without a new trial;
with costs to the appellant.*

Md.]

Syllabus.

THE MAYOR, COUNSELLOR AND ALDERMEN OF
THE CITY OF ANNAPOLIS,

vs.

SUSIE B. STALLINGS.

Municipal corporations: liability for the condition of the streets; notice; negligence. Sidewalks: rights of the people; duty of.

Where a municipal corporation is empowered by its charter to prevent and remove nuisances, to pave and keep the streets in repair, and to levy taxes therefor, the exercise of such power is not merely discretionary, but is *imperative*; and in such cases, it is the duty of the municipality not only to pass the necessary ordinances, but to be vigilant and prompt in their enforcement.

p. 345

But before a municipality can be made liable for injuries arising from the bad condition of its streets, it must be shown that it had actual or constructive notice of such bad condition.

p. 346

If the defect is of such a character as not to be readily observable, express notice to the municipality must be shown

p. 347

But if it be one which the proper officers had notice of, or by the exercise of reasonable care and diligence might have had knowledge of, in time to have it remedied, so as to prevent the injury complained of, then the liability of the municipality attaches.

p. 347

Where a municipality is negligent in enforcing such an ordinance, it can not rely upon the ordinance as a defense.

p. 349

The streets and sidewalks of a city are for the benefit of all conditions of people, and all have a right, in using them, to

assume that they are in an ordinarily good condition, and to regulate their conduct upon that assumption. p. 351

A person using a sidewalk, where there are no obvious obstructions, is required to use only ordinary care. p. 351

Decided February 11th, 1915.

Appeal from the Circuit Court for Baltimore County.
(DUNCAN, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, PATTISON, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Ridgely P. Melvin and *T. Scott Offutt*, for the appellant.

Robert Moss and *Elmer J. Cook*, for the appellee.

BURKE, J., delivered the opinion of the Court.

The appeal in this case is from a judgment entered in the Circuit Court for Baltimore County in a suit for personal injuries brought by the appellee, Susie B. Stallings, against the appellant, The Mayor, Counsellor and Aldermen of the City of Annapolis. The declaration upon which the case was tried contained two counts. The first count charged that one of the sidewalks on West street, in the City of Annapolis, was negligently suffered by the defendant to be out of repair and unsafe for travel, "whereby the plaintiff in traveling said street and using due care fell into a hole in said street, and her hip was severely injured, which injury is permanent." The second count charged that one of the sidewalks on West street, in the City of Annapolis, at a point opposite a dwelling owned by Abram P. McCombs, "was permitted to remain for a long period of time out of repair, with a large and dangerous hole in the centre of the same, and in an unsafe and dangerous condition for persons traveling upon it, and permitted to remain in said condition for a long pe-

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riod of time, to wit, six months," and that on the 13th of July, 1910, the plaintiff, while traveling over said sidewalk and using due care, fell into the hole in said sidewalk and injured, sprained and wounded her right hip, which injuries are permanent.

The appellant is a municipal corporation, and is empowered by its charter to prevent and remove nuisances; to levy and collect taxes, not exceeding one per centum per annum on all the assessable property in the city; to pass ordinances for paving and keeping in repair the streets, lanes and alleys in said city; and in addition to these powers it is granted the further power to tax any particular part or district of the city for paving the streets, lanes and alleys therein in a sum not exceeding one per centum on the assessable property in said particular part or district. It is provided by sections 14 and 15 of Article 38 of the City Code of Annapolis as follows: "Section 14—The City Commissioner shall give twenty days' notice to the owners of all property binding on which there are paved footways requiring repairs, to have the same repaired in a suitable manner, and if they shall neglect to do so within the time specified, they shall be liable to a fine of five dollars, to be recovered as in other cases." "Section 15—If owners of property, to whom notice shall be given, as provided for in either of the two preceding sections, shall refuse to pave or repair their pavement, the City Commissioner shall cause the work to be done in a suitable manner, and the Counsellor of the city shall institute proceedings to recover the cost thereof, under the powers derived from the charter of the city."

In *Baltimore v. Pendleton*, 15 Md. 12, in which the plaintiff recovered a judgment for an injury to his horse, occasioned by the digging of a trench or hole in one of the streets of the city into which the horse fell and was thereby crippled. the Court said: "In *Balto. v. Marriott*, 9 Md. 174, in commenting on the clause in the charter of the City of Baltimore. which provides that the corporation 'shall have full

power and authority to enact and pass all laws and ordinances necessary to preserve the health of the city, and to *prevent nuisances*; the Court declared it to be 'a well-settled principle, that when a statute confers a power upon a corporation, to be exercised for the public good, the exercise of the power is *not merely discretionary, but imperative*, and the words 'power and authority,' in such case, may be construed *duty and obligation*.' And in accordance with this doctrine which was sustained both by reason and authority in that case, the corporation was held liable for an injury occasioned by a person falling on the ice which was allowed to accumulate on the pavement. The same principle applies to the case now before us."

It was the duty of the defendant to have been prompt and vigilant in enforcing the provisions of the ordinance mentioned. "To pass an ordinance, and not enforce it, would be the same as if none had been passed, so far as the public interests were concerned." *Marriott's Case, supra*.

The general principles of law applicable to a case of this kind are fully stated in *Keen v. Havre de Grace*, 93 Md. 34. In that case the plaintiff, while walking along the sidewalk of one of the streets of Havre de Grace on a dark night fell into a hole and was injured. In declaring the obligations and liabilities of the city the Court said: "It is not questioned that the city of Havre de Grace has power to grade and repair its streets and sidewalks (Act 1890, Ch. 180); and when such is the case, the municipality is bound to maintain them in safe condition, and if it negligently fail so to do and thereby persons, acting without negligence on their part, are injured, it is liable to respond in damages for all injuries caused by its neglect. *M. & C. C. of Balto. v. Marriott*, 9 Md. 160; *Pendleton's Case*, 15 Md. 17. Before, however, the municipality can be made liable in any case, it must be shown that it had actual or constructive notice of the bad condition of the street. As was well said in the case of *Todd v. City of Troy*, 61 N. Y. 509: 'By constructive notice is meant such notice as the law imputes from the circumstances of the

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case. It is the duty of the municipal authorities to exercise an active vigilance over the streets; to see they are kept in a reasonably safe condition for public travel. They cannot fold their arms and shut their eyes and say they have no notice. After a street has been out of repair, so that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice and charges it with negligence.' If the defect be of such a character as not to be readily observable, express notice to the municipality must be shown. *Burns v. Bradford City*, 137 Pa. St. 367; *Cook v. The City of Anamosa*, 66 Iowa, 430. But if it be one which the proper officers either had knowledge of, or by the exercise of reasonable care and diligence might have had knowledge of, in time to have remedied it, so as to prevent the injury complained of, then the municipality is liable. *Stanton v. Salem*, 145 Mass. 479; *Gschwend v. Millvale Borough*, 159 Pa. St. 257; *City of Atlanta v. Purdue*, 53 Ga. 607.

If therefore the evidence in this case shows that there was a defect in the sidewalk, of which the city had knowledge, or by the exercise of reasonable diligence ought to have known, and the plaintiff, while exercising proper care, stepped into the hole and was thereby injured, the municipality would be liable for such damages as ensued."

The general purport and effect of the testimony contained in the record will now be considered in the light of these principles. The plaintiff, a married woman about fifty-two years of age, and in good health, lived with her husband and daughter at 189 West street, one of the public streets of the City of Annapolis. The adjoining house—191 West street—was occupied by a family named Spriggs. On the night of July 13, 1910, about nine o'clock, Virgil B. Stallings, the husband of the plaintiff, was sitting on a chair on the pavement in front of his house, and called to the plaintiff, who was in the house, to come out and watch the flickering

of the street lamps. The plaintiff came out and after observing the lights, and, seeing Agnes Spriggs in the doorway of the adjoining house, started to walk over to her to borrow an evening paper. As she was walking on the sidewalk she stated she saw some obstruction in the street, but what this obstruction was is not shown by the evidence. She testified that she walked between the obstruction and the house, and to quote her own language, "the bricks under me gave in and threw me." Virgil B. Stallings testified that he heard his wife scream a few minutes after she left him, and he said: "I run across the street, up the pavement, and I found her lying down across the pavement, unconscious. Mrs. Spriggs was there with me at the same time, and I tried to get her up, but I could not, and I found that she had this foot (indicating) down in the pavement where she put her foot on the bricks and had gone through with her, and the bricks tore her ankle, and I took the bricks from around her ankle and took her out of the hole. Mrs. Spriggs and my daughter and me picked her up bodily and carried her in the house. There she laid until morning, the next morning. She was unconscious until the next morning, and then we sent for the doctor, and the doctor came as soon as I took her off the pavement." Agnes Spriggs testified she heard the plaintiff scream and that Mr. Stallings and herself reached her about the same time, and that the plaintiff was in the hole. The evidence shows that the plaintiff sustained a painful and serious injury to her hip by the fall, and evidence was offered tending to prove that the injury is permanent.

A number of witnesses testified as to the character and extent of the defect in the pavement. It was caused by the bricks becoming loose, and the children of the neighborhood digging the sand out to an extent that created a considerable hole in the sidewalk and rendered it dangerous to pedestrians. There is evidence to the effect that this hole remained in the sidewalk from March or April, 1910, until sometime after the accident and was readily observable by persons using the street and residing in the neighborhood. The

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plaintiff testified that she had never been on this pavement until the night she was injured, and that she was unfamiliar with the sidewalk, and did not know of its defective condition. The street was rather dimly lighted at the time, and we do not find in the testimony of the plaintiff or in the other evidence and circumstances any such prominent and decisive act of negligence on the part of the plaintiff as would justify the Court in holding as a matter of law that she was guilty of contributory negligence. That, we think, was a question for the jury. There is ample evidence in the record from which the jury might have reasonably concluded that the defendant by the exercise of reasonable diligence would have known of the existence of this defect and to have repaired it, or caused it to be repaired by the owner before the plaintiff was injured. If it was negligent in enforcing the ordinance it cannot rely upon the ordinance as a defence.

At the conclusion of the whole case the plaintiff submitted two prayers as follows:

1. "If the jury find from the evidence in the case that a hole in the middle of the sidewalk on the south side of West street in the City of Annapolis, Maryland, in front of dwelling Number 191, had been permitted to remain in said sidewalk in such manner as greatly to obstruct, inconvenience and endanger the public in walking along over said sidewalk, and if the jury further find that the said hole could have been repaired by the use of proper care and diligence on the part of the defendant or its proper agents appointed for that purpose; and if the jury further find from the evidence, that the defendant and its proper agents aforesaid, had notice, or might by care and diligence have obtained notice of said hole in said sidewalk as aforesaid a sufficient time to have repaired it before the occurrence of the injury complained of, then it was the duty of the said defendant or its agents to have repaired the said hole in said sidewalk in a reasonable time after notice thereof, or after they might have obtained notice thereof by the use of ordinary care and diligence, and if the jury further find that the plaintiff while walking along said

sidewalk exercising that degree of care, which a reasonable prudent person should under similar circumstances, fell into said hole in said sidewalk and thereby received the injury complained of and that such injury occurred after the lapse of a sufficient time from the notice of said hole in said sidewalk to the said defendants, or its agents or from the period when the defendants or its agents might have obtained notice thereof by the exercise of ordinary care and diligence, then the plaintiff is entitled to recover."

2. "If the jury find for the plaintiff they are to consider in estimating damages the health and condition of the plaintiff before the injuries complained of as compared with her present condition in consequence of said injury, and whether said injury is in its nature permanent; also the physical and mental suffering to which she has been subjected by reason of said injury, and they are to allow her such damages as in the opinion of the jury will be fair and just compensation for the injury which the plaintiff has sustained."

The defendant specially excepted to the granting of the first prayer upon the ground that there was no legally sufficient evidence to show that the plaintiff fell into the hole, and to the second prayer that there was no legally sufficient evidence to show that the plaintiff's injury was permanent. As the evidence in our opinion tended to support both hypotheses of fact, the Court committed no error in overruling the exceptions. The plaintiff's first prayer is based upon the principles of law applicable to a case of this kind as declared in the cases cited above. The plaintiff's second prayer was the usual and approved prayer on the measure of damages in cases in which permanent injuries have been sustained. The first prayer of the plaintiff was granted in connection with the sixth and seventh granted prayers of the defendant, which submitted to the jury the question of contributory negligence. The defendant's first, second, third, eighth, tenth and eleventh prayers sought to withdraw the case from the jury and were properly refused. By the defendant's fourth prayer the Court was asked to instruct the jury that if the defect was

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for the *first time* discovered on June 27, 1910, "by any agent, servant or officer of the defendant, and on the same day the defendant sent a notice of such defect to the owner of the abutting land requiring him to repair such break, and that the accident complained of occurred within twenty days from the sending of such notice, then the jury must find their verdict for the defendant." This prayer ignores the evidence which tended to show that the defendant might have discovered the defect by the exercise of ordinary diligence long before the date mentioned in the prayer, and makes the defendant's liability depend upon *actual knowledge*, for the first time then acquired. It ignored the question of imputed notice and was properly refused. The defendant's fifth prayer is defective for the same reason, and in ignoring the question of the neglect of the defendant in not properly enforcing the ordinance, and there was no error in rejecting it. The ninth prayer asserted that the plaintiff was bound to exercise an extraordinary degree of care in using the street. The streets and sidewalks of the city are for the benefit of all conditions of people; "and all have a right, in using them, to assume that they are in an ordinarily good condition, and to regulate their conduct upon that assumption. A person may walk or drive carefully in the darkness of the night, relying upon the belief that the corporation has performed its duty, and that the street or walk is not in an unsafe condition." 4 *Dillon on Munic. Corp.*, 5th Ed., sec. 698. The plaintiff was required under the circumstances in using the sidewalk to exercise only ordinary care. 2 *Shearman & Redfield on Negligence*, sec. 376; *County Commissioners v. Mandanyohl*, 93 Md. 152; *Anne Arundel Co. v. Carr*, 111 Md. 152.

We do not deem it of sufficient importance to discuss separately the exceptions to the testimony. We have examined these exceptions carefully, and we find no reversible error in any of them.

The judgment appealed from will accordingly be affirmed.

Judgment affirmed, the appellant to pay the costs.

FIDELITY SAVINGS BANK OF FROSTBURG, MD.,
ET AL.,

vs.

MURRAY VANDIVER, TREASURER OF MARYLAND.

*Deposit by savings banks of bonds with Treasurer of State:
in trust for depositors. Repeal by Legislature; right of
depositors. Statutes: construction; duty of courts.
State officials: suit against; costs.*

Chapter 109 of the Acts of 1892, requiring certain savings banks to deposit bonds with the Treasurer of the State, the same to be registered in his name, had the effect of constituting the Treasurer as a trustee for a certain specific purpose; but as the trust was created by Act of Assembly, it was analogous to a trust created by an individual with a reserved right of terminating the trust. p. 355

The depositors in such banks were not, and technically could not become, *cestuis que trustent*, with regard to such bonds, unless, or until, by the failure of such banks there was a necessity of having recourse to the bonds. p. 355

But under the provisions of that Act, the depositors had a distinct interest in the preservation of the fund, of which they

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could not be deprived, by any subsequent Act, which by its terms is prospective only. p. 356

The Act of 1914, Chapter 781, directing the State Treasurer to forthwith surrender to each of the savings bank the bonds so deposited by each, respectively, and declaring that the Act is to be construed retrospectively as well as prospectively, violates no vested rights, contravenes no section of the Constitution, and is valid. p. 356

With the wisdom or unwisdom of legislatures, the courts have nothing to do; the duty of courts is to carry out and give effect to legislative enactments, whenever the said enactments do not transcend the Legislature's constitutional power. pp. 355-356

Statutes, in general, are not given effect retrospectively, unless it appears either by express language or necessary implication, that such was the legislative intent. p. 355

An Act of the Legislature is always subject to repeal by a succeeding Legislature. p. 355

In suits against a State official, where the rights involved are of a purely private character, and for the benefit of the appellants, the costs should not be taxed against the official, even though the order appealed from be reversed. p. 356

Decided February 11th, 1915.

Appeal from the Circuit Court for Anne Arundel County.
(BRASHEARS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

D. Lindley Sloan (with whom was *Albert A. Doub* on the brief), for the appellants.

Edgar Allan Poe, Attorney General, submitted a brief for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

This case arises from a second application for a writ of mandamus to require the State Treasurer to surrender to three Savings Banks located in Allegany County, Maryland, certain bonds, severally deposited by them with the State Treasurer, in compliance with the provisions of three several Acts of Assembly amending the charters of the respective banks.

The first application and the opinion of the Court in that case are reported in 120 Maryland, 619, and the facts with a single exception will be found fully stated in the opinion in the former case. The additional fact which has transpired since the first decision was rendered, was the passage by the General Assembly of 1914, of an Act designated as Chapter 781. By that, after the recital of the antecedent legislation, it was provided in section 2 as follows:

"Be it further enacted by the General Assembly of Maryland, That the Treasurer of Maryland be, and he is hereby authorized and empowered and directed forthwith to surrender to each of the said savings banks such bonds or securities as may have been deposited with him by each of said banks, by virtue of the provision of Chapter 109 of the Acts of the General Assembly of 1892, and any amendments thereto, and that this Act shall be construed retrospectively as well as prospectively."

The provisions of the statute under which the deposits were made required them to be registered in the name of the State Treasurer, officially, and held as a trust under and pursuant to the Act, "and the same shall be held by said

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Treasurer in trust as security for the depositors.” The effect of this legislation was to constitute a designated State official as a trustee for certain specific purposes; the trust was one created by an Act of the General Assembly, and since an Act of the Legislature is always subject to repeal by a succeeding Legislature, the trust must be construed as analogous in many respects to a trust created by an individual with a reserved power in the person creating it of terminating the trust. As was pointed out in a former opinion, the effect of this was to make the position of the depositors similar to that of *cestui que trustent*—they were not technical *cestui que trustent*, for that position could only arise upon the failure of the banks, and a necessity to have recourse to the securities deposited for the benefit of the depositors. But a condition was created which gave to the depositor a distinct interest in the preservation of the fund in the hands of the official trustee. This position the Legislature had attempted to alter at its session of 1912, by a series of Acts repealing so much of the previous legislation as required the making of these deposits. In 120 Md. it was held, that while the Act of 1912 (Ch. 828) was perfectly competent legislation so far as all future depositors were concerned, it could not operate so as to affect those who had become depositors prior to the passage of the Act of 1912, for the reason that the Act could not be given a retroactive effect unless it appeared either by express language or necessary implication that such was the legislative intent, and that was not to be found in the Act of 1912. It was to cure this omission that the Act of 1914 was passed, wherein by the last sentence of the section already quoted it was enacted “that this Act shall be construed retrospectively as well as prospectively.” There can thus be no doubt whatever of the legislative intent, and that being the case and the Legislature having in express terms declared that the Act was to operate retrospectively, it is the duty of the Court to give effect to that expressed purpose. With the wisdom or unwisdom of such legislation it is not the province of this

Court to deal, all that the Court is called upon to do or can properly do, is to carry out and give effect to the legislative enactment, whenever that enactment does not transcend the constitutional power of the Legislature.

No vested right existed in any depositor to the bonds deposited with the State Treasurer, or any of them; no section of the Constitution was violated by the passage of the Act.

The petitioners for the mandamus were, therefore, entitled to the relief sought and the writ should have been issued.

The order must accordingly be reversed and the case remanded to the Circuit Court for Anne Arundel County, to the end that the writ of mandamus may issue as prayed.

But while the action of the lower Court must be reversed, the costs will be imposed on the appellants. The legislation which gave rise to this case was of a purely private character, for the benefit of the appellants; and in his refusal to surrender the bonds of State Treasurer was but discharging a plain duty. He could not in the absence of a valid order of Court comply with the request of the appellants without subjecting himself to the possibility of a charge of dereliction of duty, and of imperiling his bond.

Order reversed and cause remanded that the writ of mandamus may issue in accordance with the prayer of the petition; costs to be paid by the appellants.

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Syllabus.

ANNIE DENSON

vs.

ALFRED DENSON, ET AL.

Equity: sales of land; unknown remaindermen; jurisdiction of equity only found in section 228 of Article 16 of the Code; no authority to reserve part of proceeds for reinvestment and distribution to life tenant.

A court of equity has no authority or jurisdiction to decree a sale and conveyance of land, to which unborn remaindermen have title, excepting the authority and jurisdiction contained in section 228 of Article 16 of the Code. p. 363

Under that section, there is no authority in a court of equity, by a decree, to reserve a portion of the proceeds from the prescribed reinvestment, in order that such portion may be distributed at once to a life tenant. pp. 363-364

But where the life tenant was conducting a profitable business of her own upon the property, and a separate sum was paid to her, for her business and good-will, the proceeds of the sale of such business formed no part of the fund for the benefit of the remaindermen, and to it only the life tenant was entitled. p. 366

But out of the proceeds of the sale of the property itself the life tenant was not entitled to have any *additional* sum awarded to her specially for her business interests, apart from her interest as life tenant. p. 366

Decided February 11th, 1915.

Appeal from the Circuit Court No. 2 of Baltimore City.
(AMBLER, J.)

The facts are stated in the opinion of the Court.

The cause was submitted to BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Wm. B. Smith and *James G. Phillips*, submitted a brief for the appellant.

A. Morris Tyson, submitted a brief for the appellees.

URNER, J., delivered the opinion of the Court.

The will of John Denson, who died in 1907, bequeathed two contiguous leasehold lots of ground, fronting on Bath street and Foundry alley in Baltimore, to his wife, Annie Denson, for life, and after her death to his two brothers, Alfred C. and William J. Denson, but provided that if either of the brothers should die in the lifetime of the widow, without leaving any children, the survivor should be entitled to the property, and if both should die during that period without issue, the widow should become entitled absolutely, and if either or both of the brothers should die in the widow's lifetime leaving children, the share of the deceased parent should go to his children at the widow's death. The testator had conducted a saloon and restaurant in a small building on the property, and after his death the business was continued by his widow. In 1913 the Pennsylvania Railroad Company desired to secure the property, and its representative, Mr. Julian S. Carter, called upon Mrs. Denson and inquired whether a proposition of purchase would be entertained. Mrs. Denson stated that the property belonged to her for life and she did not want it sold at any price because she had a

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business and was making a living there, and it would put her to some expense to move from the premises and get the business established at another location. After a number of conversations it was finally agreed that Mrs. Denson should be paid \$2,750.00 as a special and separate consideration for her consent to a sale and for the trouble and expense which she would thereby incur, and that the property should be purchased at the price of \$3,500.00. It was understood that equity proceedings would be necessary for a sale, and transfer of the title, and a bill was promptly filed by Mrs. Denson for that purpose under section 228 of Article 16 of the Code. The bill alleged that it would be to the advantage of all parties concerned to have the property sold and the proceeds invested for their benefit. The contingent remaindemen now in existence being the two brothers of the testator and their infant children, were made defendants. It was on March 14, 1913, that the agreement with the widow was effected, and the bill was filed the following day. A separate agreement was executed on the 14th, between Mr. Carter and Mr. Thomas C. Ruddell, who was engaged by Mrs. Denson to conduct the proceedings for the sale, and who is designated in the contract as "trustee," by which the property was agreed to be purchased by Mr. Carter for the sum of \$3,500.00, subject to ratification by the Court.

On the same day upon which the bill was filed the plaintiff petitioned the Court for an immediate sale upon the allegation that the property could be sold for \$3,500.00 to Julian S. Carter, but that he required its possession at once in order that it might be used in connection with the improvements for which he was making the purchase, and that the price offered was much in excess of any that could be realized at public auction, that a sale would be decreed at the final hearing, and that it would be greatly to the advantage of all the parties that an order should be passed immediately appointing a trustee to make the sale at the price and to the purchaser mentioned. In accordance with this peti-

tion, and the Court being satisfied that a sale would eventually be decreed, an order was passed appointing Edward A. O'Mara and Thomas C. Ruddell as trustees to sell the property for not less than the sum proposed. A private sale of the property to Julian S. Carter for \$3,500.00 was reported by the trustees on the same day. The sale was finally ratified on June 12, 1913, and on the following day the trustees executed their deed to the Manor Real Estate and Trust Company, an auxiliary of the Pennsylvania Railroad Company, as the assignee of the purchaser.

The separate sum of \$2,750.00 agreed to be paid Mrs. Denson was received by her from the same company on September 17, 1913, and she then executed a deed to the company purporting to convey all her interest in the property.

In the meantime a petition had been filed by Mrs. Denson, on June 30th, in which she stated that the property decreed to be sold was improved with a small store building and a stable in the rear, that it was of little value over the ground rent of \$33.75 per annum, that the evidence which had been taken in the case showed that the highest estimate placed upon it by competent appraisers was \$800.00, that she had occupied the store building for the purposes of a saloon, in which she had built up a large business and had installed expensive bar fixtures, that she consented to file a bill for the immediate sale of the property for the sum of \$3,500.00, which was far beyond its value, but was a proper sum in view of the amount of damage which she sustained by the breaking up of her business, and that she believed herself to be entitled, in addition to the value of her life interest, to some compensation for the loss of her business and for the fixtures which she had placed in the store and which had now become useless. An order was passed for the taking of testimony in reference to the subject-matter of the petition. The only witness examined on that subject was Mrs. Denson herself, who testified that she had repaired the buildings and equipped the saloon at a total cost of \$1,000.00, and that

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her net profits from the business were about \$100.00 per week.

A decree passed on September 25, 1913, confirmed the sale previously ordered, and referred the case to the auditor for the preparation of an account. It also provided that the proceeds of sale remaining after the payment of expenses should be held and invested subject to the same limitations as were imposed by the will of John Denson upon the property decreed to be sold. About two weeks later Mrs. Denson filed another petition, which referred to the provision in the decree as to the investment of the fund, and claimed that the petitioner as life tenant was entitled to receive, by way of commutation, a due proportion of the proceeds of sale according to her age and health as disclosed by the testimony. It was prayed that the decree be modified so as to direct such a payment. Upon this petition, and the consent in writing of counsel for the adult defendants, an order was passed changing the decree to the extent of providing that the petitioner be paid the value of her life estate. There was a further agreement by the same counsel, that Mrs. Denson should be allowed in the audit, subject to exceptions, the sum of \$500.00, "as compensation for the betterments which she placed upon the property."

By the auditor's report, Mrs. Denson was awarded \$500.00 for betterments in accordance with the agreement of counsel just referred to, and \$807.52 in lieu of her life estate, being six-fifteenths of the net proceeds of sale, and the residue of the fund was distributed in equal shares to William J. and Alfred C. Denson for life, with remainders as set forth in the will of John Denson, deceased.

Exceptions to the audit were filed by the trustees. They objected to the allowance made to the widow in lieu of her life estate for the reason that she had conveyed, by her quit claim deed of September 17, 1913, all her interest in the property to the Manor Real Estate and Trust Company for the sum of \$2,750.00, and they disputed the award of \$500.00 for betterments upon the same ground.

At this stage of the proceedings an order was passed by the Court appointing counsel for the guardian *ad litem* of the infant defendants to represent their interests in reference to the questions raised as to the disposition of the funds. A petition was thereupon filed in the name of the guardian *ad litem* praying that the order providing for the commutation of the widow's life estate be rescinded, and exceptions were filed in his behalf to the allowance in the audit of \$807.50 for that purpose, and to the item of \$500.00 for repairs and fixtures, and also to the distribution made for life to William J. and Alfred C. Denson for the reason that they are not given life estates by the will. These exceptions, moreover, protested against the ratification of any auditor's account in the case until the consideration received by Mrs. Denson from the Manor Real Estate and Trust Company should be brought into Court.

Testimony was taken upon the issue raised by the various exceptions, and upon final hearing a decree was passed requiring Mrs. Denson to bring into Court the sum of \$2,750.00 which she had separately received, the theory of this direction being, as stated, that, that the sum mentioned was in reality part of the consideration paid by the purchaser for the property sold in the proceedings. The decree also rescinded the order for the commutation of the widow's life estate, sustained the exceptions to both allowances to her in the audit, and provided that the funds be invested so as to enure to the benefit of the persons and according to the interests designated by the will of the testator. From this decree Mrs. Denson has appealed.

The Court below was clearly right in disallowing the appellant's claim for a commutation of her life estate. The decree of sale was passed in the exercise of jurisdiction conferred by section 228 of Article 16 of the Code, whose terms and purpose render the demand for a present money payment in lieu of the life interest altogether inadmissible. It is provided by that section that: "In all cases when one or more persons

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is or are entitled to an estate for life * * * or any other particular, limited or conditional estate in lands, and any person or persons is or are entitled to a remainder or remainders, vested or contingent, * * * or any other interest, vested or contingent, in the same land, on application of any of the parties in interest, a Court of equity may, if all the parties in being are parties to the proceeding, decree a sale or lease thereof, if it shall appear to be advantageous to the parties concerned, and shall direct the investment of the proceeds of sale * * * so as to enure in like manner as by the original grant to the use of the same parties who would be entitled to the land sold or leased, and all such decrees, if all the persons are parties who would be entitled if the contingency had happened at the date of the decree, shall bind all persons, whether in being or not, who claim or may claim any interest in said land under any of the parties * * * or from or under or by the original deed or will by which such particular, limited or conditional estate, with remainders or executory devises, were created."

It was necessary to invoke the jurisdiction thus conferred because the title to the property to be sold was subject to contingent limitations in favor of a class of persons some of whom might come into being after the passage of the decree and at any time prior to the death of the tenant for life. Apart from the provisions we have quoted the Court had no authority to decree a sale and conveyance of the title of unborn remaindermen. *Downin v. Sprecher*, 35 Md. 474; *Downes v. Long*, 79 Md. 388; *Murphy v. Coale*, 107 Md. 209. In extending the scope of equity jurisdiction so as to provide, in proper cases, for the disposition of land having such limitations of title, the Legislature directed in explicit terms that the proceeds of sale shall be invested so as to enure to the benefit of the persons entitled in like manner as provided by the original deed or will. It would be a plain violation of this requirement to reserve a portion of the proceeds of sale from the prescribed re-investment in order that

it might be distributed at once to the life tenant, and her proposal to that effect, therefore, cannot be entertained.

Our examination of the record has led us to a different conclusion from that indicated by the learned judge below in decreeing that the sum received by the plaintiff from the vendee of the property be paid into Court as part of the purchase price. The evidence is distinct, positive and uncontradicted to the effect that the separate payment to Mrs. Denson was made and accepted as compensation to her for any inconvenience and loss she might sustain in removing from the property and as an inducement to the withdrawal of her objection to the sale. Mr. Carter testified: "When we negotiated for this property we thought Mrs. Denson could prevent the sale of it. The railroad wanted us to close the matter as soon as possible. We recognized the fact that the quickest way to get the sale through was to compensate her to the extent that she thought she should be remunerated for her business." "When we dealt with her she said she wanted so much money for herself outside of what she would get from the trust estate for the reason that she had this business and she lived there and she would have to buy a new business and open up a new business. We agreed to pay her \$2,750.00. In order to get her consent to sell the property we thought it necessary to do this." "In other words," as he said, the idea was to "straighten her out and then buy the property afterwards."

The testimony of Mrs. Denson on this point was, in part, as follows: "In the early part of March Mr. Carter came to me and wanted to know whether I wanted to sell my property. I said, 'No.' it did not belong to me; I had a life interest in it. He said to me, if I were to sell it, what would I want for the property? I told him I had not decided to sell it at all. I was making a living there and my business netted me from \$100.00 to \$125.00 a week, and I did not care to sell at all. He said, 'Suppose we made you a good offer, would you sell?' I told him he would have to give me time to think it over; it was so sudden; so in about a week

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he came back, and asked me if I had thought it over. I told him no, not at that time. He said, 'Well, suppose we talk it over and we will make you a good offer to sell. Will you sell?' I said it would be the breaking up of the business and my home, and it would take quite a while for me to establish myself in another place. * * * So, he offered to give me \$2,750.00 for my business, and \$3,500.00 for the property. I told him, 'All right, I will be perfectly satisfied to sell it.' So he gave me \$2,750.00 for my business interest and good will. * * * He asked me when I could give him possession of the property. I said I would have to look around and locate myself in another place. I could not find a home in the meantime, so I did not break up until the 15th of September, and he told me that as soon as I gave him possession of the property he would give me the money, the \$2,750.00 for my business and good will. So, on the 15th of September I moved, and on the 17th I went to the office there and he gave me my money."

The proof in the case shows that when Mr. Ruddell, in the capacity of nominal trustee, contracted for the sale of the property for \$3,500.00, he was not aware of the separate arrangement for the payment of \$2,750.00 to Mrs. Denson. and that the trustees appointed by the decree were without any knowledge on that subject when they reported the sale for ratification. In the course of the proceedings it was duly proved that the sale of the property for \$3,500.00, being four times the value estimated by the witnesses, was advantageous to all the parties interested. The proposal of purchase for that amount was the only one which the trustees received and the Court approved. It was that price which constituted the sole and ample consideration for the contract upon the basis of which this proceeding was instituted and for the consummation of which the preliminary order and final decree of sale were passed. In our opinion there is no adequate reason for now requiring an extension of the scope and terms of the sale reported, beyond the real and original intent of the trustees and the purchaser, so as to make it

include a consideration which it did not contemplate and which rested upon an entirely separate and distinct agreement. While the deed subsequently executed by the plaintiff, at the instance of the purchaser, purported to convey all her interest in the property, such an instrument was neither necessary nor effective to transfer any part of the title, as that had already been conveyed as a whole by the deed of the trustees executed three months previously. The effort of the plaintiff, by her petition, to have the estate pay her for a loss of business as to which she was fully indemnified by her agreement with the purchaser must, of course, be disapproved, but we find no ground for depriving her of money which she has received as the result of an independent arrangement based upon a consideration in which the other parties to the cause were not intended or entitled to share and by the payment of which they have not been prejudiced.

The question as to the disallowance of the claim for repairs or "betterments" was not discussed in the argument on behalf of the appellant. It will be sufficient to state our conclusion, upon the evidence, that the claim was properly refused.

Decree affirmed in part and reversed in part, and cause remanded for further proceedings, the appellant to pay one-half the costs of the appeal, and the remainder to be paid out of the funds in the hands of the trustees.

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Syllabus.

JOSEPH HOLLARS

vs.

STATE OF MARYLAND.

Criminal Court: grand jury; irregularities in drawing names; clerical misprision of names; party meant, the one actually drawn. Indictments: motion to quash; grand jury; irregularity in selection; effect of.

A traverser having been indicted for a violation of liquor laws, made a motion to quash the indictment, on the ground that the name of one of the grand jurors by whom the indictment was found, was not on the list of names from which the jurors were to be selected, and that his name had been at any time placed in or drawn from the list from which such names were to be drawn; the State, in its answer, alleged that the juror drawn was the one intended to be drawn, but by a clerical error the name was accidentally misspelled; the traverser demurred: *Held*, that as the demurrer admitted the juror actually drawn was the one intended to be drawn, and as no injury had been shown or alleged, the error was immaterial.

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The motion to quash was a proper way to raise the question.

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Section 1 of Article 51 of the Code, stating the qualifications for grand jurors, is directory merely; and to invalidate an indictment upon the non-age of a juror, it must be made to appear to the court that the traverser has been prejudiced by reason thereof.

p. 372

Unless irregularities, incident to carrying out in good faith, the provisions of the law made for the selection of juries, are shown materially to violate the statute, or so affect the juries as to prejudice the right of citizens, such irregularities should not be treated as vital.

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Decided February 12th, 1915.

Appeal from the Circuit Court for Baltimore County.
(DUNCAN, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Elmer J. Cook and *William H. Lawrence*, for the appellant.

Edgar Allan Poe, Attorney-General, (with whom was *George Hartman*, State's Attorney for Baltimore County, on the brief), for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

Joseph Hollars, a duly licensed dealer in spirituous and fermented liquors, was indicted by a Grand Jury for Baltimore County, upon the charge that he had violated the liquor laws of that county (Act of 1908, Chapter 495) by the sale of beer upon Sunday. Through his counsel he moved to quash the indictment on the ground that the Grand Jury, by which the indictment was found, had been improperly constituted, and that the defects were of such a nature as to render any indictment by that body null and void. The motion to quash being overruled, upon trial, Hollars was found guilty and sentenced to pay a fine of three hundred dollars. This appeal, which is taken from that judgment, raises the question of the correctness of the ruling of the Court in refusing to quash the indictment. That the motion to quash was a proper method by which to call in question the legality of the organization of a Grand Jury has been abundantly settled. *Cooper v. State*, 64 Md. 44; *U. S. v. Gale*, 109 U. S. 65.

The reasons for which the Circuit Court for Baltimore County was asked to quash the indictment, and which are

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relied upon now, all relate to the composition of the Grand Jury by which the indictment was found. The record in the case is not as full or explicit with regard to some of the matters involved as was to have been desired, but this Court can deal only with that which appears in the record, and the natural and legal intendment to be drawn from that which does appear there.

One of the grounds upon which the indictment is assailed is that Henry N. Grenninger, one of the Grand Jurors by whom the indictment was returned, was not on the list of two hundred names filed in the office of the clerk of the Circuit Court from which the jurors for that term were selected, nor was his name at any time placed in or drawn from the box from which the names of persons for the jury for said term were drawn.

From the answer filed on behalf of the State, it appears that by an error on the part of a clerk in the office of the Supervisors of Elections the name of Harry N. Granger was furnished to the County Commissioners, and by them forwarded to the clerk of the Circuit Court; that the clerk of the Circuit Court placed the name of Harry N. Granger in the box, and that his name was drawn as one of the Grand Jurors; that after the drawing had been made the error was discovered by the Court and the sheriff directed to summon Henry N. Grenninger, and that "the said Harry N. Grenninger was the identical person intended by the Court."

This answer of the State was demurred to by the traverser, and the effect of that demurrer was necessarily to admit the facts set out in the answer. This would bring the case under the rule laid down in the *Case of a Jurymen*, 12 East. 231, in which R. Curry had responded to the name drawn of J. Curry, and in the case of *Roe v. Devys*, Cro. Cases, Temp. Charles, 563, where a jurymen named Samuel was impaneled and sworn by the name of Daniel, but in neither case was the error held to invalidate the action of the jury. These cases were approved and followed in this State in *Munshower v.*

State, 56 Md. 514, where in a murder case there had been an error in the middle name of one of the jurors, the name as drawn from the box being Joseph H. Brown, and he was designated on the panel as Joseph B. Brown. From these cases and others that might be cited, it is clear that a clerical error either in an initial or in a name itself, will not vitiate a verdict or an indictment where the person serving on the Grand Jury or impaneled on a petit jury is the person intended by the Court to have been selected, and no prejudice has resulted to the accused. *U. S. v. Reed*, 2 Blatch. 435; *Fed. Cas.* 16134.

The motion to quash does not allege anything prejudicial to the accused resulting from the incorrectness of the name placed in the jury box, and by the demurrer the traverser admits that Henry N. Grenninger was the identical person intended by the Court under the name of Harry N. Granger. No sufficient ground for the granting of the motion, therefore, can be predicated upon this ground.

A second ground of attack upon the indictment is an error in the names of Stephen G. Rawlings, Mercer B. Porter and Jarrett Lee. In each instance the error complained of was alleged in the answer, and admitted in the replication, to have been of a clerical nature, and what has been said with regard to the mistake in the name of Grenninger sufficiently covers all of these cases.

A further ground of attack is that John C. Felter, one of the Grand Jurors, was under the age of twenty-five years. The Code, Art. 51, sec. 1, provides, "that no person shall be selected and placed upon a panel as a juror who shall not have arrived at the age of twenty-five years." The appellant insists that this language is mandatory, and inasmuch as Felter was under twenty-five, that any indictment found by a Grand Jury of which he was a member is necessarily null and void. The third section of the same article declares all persons over seventy years of age and delegates, coroners, constables, school masters and pharmacists exempt. In construing these provisions this Court has heretofore held with

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regard to section 3 that the language was directory rather than mandatory, and in *Green v. State*, 59 Md. 123, JUDGE IRVING, speaking for this Court, dealt with both section 1 and section 3, in the following language: "In respect to the direction about age the weight of authority is strongly in support of the doctrine, that the duty imposed on the clerk of the Commissioners about the list of male taxables, not known to him to be under twenty-five years of age and the judge in respect to the selection of persons from the box over twenty-five and under seventy, is directory only. The law requires of them, of course, the honest exercise of their judgment respectively as to the age of persons put on the list, or placed in the box, but it is impossible for the clerk to know with absolute certainty who is under and who is over twenty-five years of age. The statute provides no method of ascertainment, he is only directed to exclude such persons from the list as are known to him to be under twenty-five. All over that age he is to put on * * *. There can be no doubt that a wilful disregard of duty in this particular would be punishable, but a simple mistake can not and ought not to affect the validity of the list which he makes for the Court's guidance. Where the jury is selected and drawn it would be impossible for the judge to know with certainty whether all the persons he selects for the box are under seventy or over twenty-five. Ascertainment at the time of drawing and selecting is impracticable and not provided for. His judgment is his guide. If the judge makes a mistake the statute directs how it may be corrected, and expressly declares it shall not vitiate the drawing."

It is true that in the *Green Case* the endeavor to set the verdict aside upon the ground of age, was held to come too late, but the language quoted is clearly indicative of the view of the Court as to the proper construction to be placed upon the statute.

In the case of *Johns v. Hodges*, 60 Md. 215, a verdict was rendered by a jury, two members of which were under the age of twenty-five years, and a motion for a new trial in

that case was made upon the ground of the non-age of these two jurors. The decision virtually turned upon the time when the objection was made, and that as it was not made until after verdict, it was too late to be availed of, but in the course of the opinion occurs the following language, bearing upon the question now being considered.

“Under our present jury system while the law aims to exclude persons under twenty-five years of age from serving on juries, from the nature of the methods prescribed by the statute for drawing a jury, no certain means are provided for the absolute exclusion of such persons. The presumption arises, therefore, not that the officers charged with the duty of preparing the lists have wholly succeeded in securing those free from all statutory disability, but that they have succeeded so far as diligence and good faith within the scope of their opportunities have enabled them to do so.”

In the light of these decisions, this Court must hold that the statute, section 1 of Article 51 is directory merely, and that to invalidate an indictment upon the ground of non-age it must be made to appear to the Court that a traverser has been prejudiced by reason of the non-age of the juror.

It further appears from the pleadings in this case that there were in the box the names of a number of persons which had been stricken from the poll book in October, 1913, one at least who had died, and some who had removed, but with the exception of the names mentioned it does not appear that any of these persons were drawn from the box as jurors, certainly none upon the Grand Jury, and the presence in the box of a name which perhaps should not have been there, could not operate in any way to the detriment of the traverser if he was not upon the Grand Jury, and *a fortiori* if the name was never drawn from the box at all, he could in no way have been injured.

In many of the counties of this State there are local laws in force with regard to the procedure for the drawing of a jury, but for Baltimore County there has been no such local

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legislation, and the composition of juries is entirely governed by the provisions of the general law.

By section 6 of Article 51 it is made the duty of the clerk of the County Commissioners to make out and file with the clerk of the Circuit Court for the County, not less than twenty days before the beginning of the second regular term of said Court after each and every general election, a fair and complete list of the male taxable inhabitants or residents of said county who are not known by the clerk to be under the age of twenty-five years, and to which list the clerk is required to append a certificate. From the agreed statement of facts filed in this case it is admitted in paragraphs 1 and 8 that no such list was made out by the clerk of the County Commissioners and filed with the clerk of the Circuit Court. By section 7 of the same Article provision is made for the drawing of jurors; for notice of the time and place of the drawing to be given. It further provided that at such time and place the judge or judges shall select from the list last furnished by the clerk of the County Commissioners, and *from the poll books* of the several districts of said county that shall be returned and filed in the clerk's office after any general election that may be last held, the names of 200 persons, which names so selected shall go into the box from which the requisite number of grand and petit jurors is to be drawn.

The contention is, that under the *Avirett case*, 76 Md. 510, the names in the box from which the Grand Jury was drawn not having been taken from the list required to be furnished by the County Commissioners no valid drawing could be made, but the decision in that case will not sustain any such contention. The list which is required to be furnished by the County Commissioners is a list of persons taxable, and the 4th section of Article 51 expressly provides that "no property qualification shall be required in any juror." Hence, since the list provided for in section 6 is a list of the male taxable inhabitants or residents of the county only, the poll

books are given as an alternative or additional source from which jurors may be obtained. This conclusion is fully borne out by the language of JUDGE McSHERRY in the *Arivett case*, where he said, that if the selections "be made from sources not mentioned by the statute instead of from *the two specifically prescribed thereby*," that a jury so drawn would be at variance with the law, and an indictment found by such a jury would be absolutely null. In the case of the *State v. Keating*, 85 Md. 194, it was said by JUDGE BOYD, speaking for this Court, that the judge drawing the jury "must see that those selected are either on the tax list or poll books." It will thus be seen that the law as previously construed by this Court distinctly recognizes two separate and independent sources from which the names of jurors may be obtained.

It has already been observed that no list of male taxable inhabitants or residents of Baltimore County was furnished by the County Commissioners to the Clerk of the Circuit Court. The second paragraph of the petition of the traverser alleges that the list of two hundred names selected, was not taken from either a list of taxable inhabitants or from the poll books; the answer is that the list of two hundred names was selected from the legally qualified voters of the several election districts of the county, and upon this allegation issue was joined. In the agreed statement of facts, the very first stipulation is to the effect that no tax list was filed as provided for in section 6, and the same is repeated in paragraph 8 of the agreed statement of facts. But there is nothing in the answer or in the agreed statement of facts which negatives the selection of the names from the poll books. On the contrary it affirmatively appears that the County Commissioners furnished the Clerk of the Circuit Court a list of the voters prepared by a clerk in the office of the Supervisors of Elections, which was in the possession of the judge when making his selections. The poll books mentioned in the statute were but copies of the registration lists giving the names

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and residences of the qualified voters, and while the poll books as there specified no longer exist, the list in the possession of JUDGE DUNCAN was in effect exactly the kind of list set out in Art. 51 as a proper source from which to make the selection of names to be placed in the box, for while changes with respect to the books designated as poll books have been made in the election laws of the State, no corresponding change has been made in the law with respect to jurors. In the case of *Downs v. State*, 78 Md. 128, JUDGE FOWLER, speaking for this Court, said: "Under the registration law now in force, the registry of voters and the poll books so far as the names are concerned, are identical." And in that case it was held if the registry books were used as a source from which to select the names of jurors, there was a sufficient compliance with the statute. The registration books are the official record of the qualified voters of a county, and the use of them have been in terms approved by this Court, but since the Legislature has not seen fit to make any alteration in the provision of the jury law as to the use of poll books, and the list used in this case was, as were the poll books, a copy of the names appearing on the registration books, the provision of the statute was sufficiently gratified by the use of the list so furnished to the judge. If there had been an allegation of fraud in the preparation of the list by the clerk in the office of the supervisors, or the willful addition to or omission from it of names, an entirely different case would have been presented. But there is no suggestion of anything of this character.

Annual registration no longer prevails in this State. The same registry books may be, and are, used from year to year, and the fact that some of the names appearing on such registry were marked as stricken from the list of qualified voters, or that they had died or removed from the county in October, 1913, can raise no inference that the books were not used by the judge in September, 1914, to select the names to be placed in the box, and if by an oversight of the clerk in mak-

ing the copy or of the judge in selecting, some names which had been stricken off found their way into the list of two hundred persons from which the jurors were to be drawn, it was an irregularity with regard to which there is no imputation or allegation of bad faith. This objection, therefore, is fully met in the case of *State v. Glasgow*, 59 Md. 210, where the language of this Court was, that "unless irregularity incident to carrying out the directions of the statute in good faith shall be shown to materially violate it or so affect the juries as to prejudice the rights of the citizen, these irregularities should not be treated as fatal."

The case of *Avirett v. the State*, 76 Md. 510, is much relied on by the appellant, but the important question in that case was wholly different from the one now presented. There the names of jurors placed in the box had not been selected from any source whatever pointed out by the law, or authorized by it; but JUDGE HOFFMAN had selected the names of persons who had been suggested to him by individuals, some of whom were members of the bar and who might be supposed to be employed in cases to be tried before juries of which one or more of those whom they had suggested would form a part. Such a source was strongly condemned by this Court, alike as being unauthorized by law, and having at least the possibility of rendering the impartial trial of cases more difficult, and as opening a way for a grave abuse in the administration of justice. That case was, therefore, radically different from the one now being considered.

Numerous authorities from other States were cited in the argument. An examination of these cases discloses the fact that they either enunciated certain general principles, which are readily conceded by every one, or else were construing the statutes of the particular State, and, therefore, by no means controlling of the present case.

With regard to all these cases it may well be said, as said by JUDGE PEARCE in *The State v. McNay*, 100 Md. 622: "It is obvious that general expressions upon this subject, taken

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from any particular case, must be considered with reference to what was in each case considered and decided. Whether a particular provision of a statute is to be held mandatory or directory, does not necessarily depend merely upon the language in which it is declared, but in large measure upon the character and purpose of the provision and the legislative intent to be deduced from a proper consideration of the means provided for its certain operation and the consequences which would follow from one or the other construction. Positive commands and positive prohibitions have alike been held directory."

With regard to the provisions of a local law requiring that the jurors should be able to read and write, the opinion says: "The consequence of holding this provision mandatory would be far-reaching and most disturbing. The probable frequency of mistakes in this respect would jeopardize the validity of indictments and the affirmance of this judgment would offer strong inducements for collusion between criminals and the venal jurors who in spite of every precaution are sometimes empaneled. It was undoubtedly such considerations as these which caused the U. S. Circuit Court for the Southern District of Ohio to hold in *U. S. v. Ambrose*, 3 Fed. 283, that where a Grand Jury was drawn under the Act of Congress of 1879 and the name of one of the jurors who had assisted in finding the indictment was not put into the box or drawn from it by any competent authority, and there was no imputation that such name appeared in the venire through bad faith, this was an irregularity only which would not vitiate the action of the Grand Jury."

For the reasons indicated this Court concurs in the rulings made by the Circuit Court for Baltimore County, and the judgment of that Court will be affirmed.

Judgment affirmed, with costs.

HENRY L. BRACK, AND EMMA BRACK, His WIFE.

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE.

Condemnation of land: compensation; market value; special value; available for particular purpose; award to be in money; special reservation of privileges to property owner, to abate damages, not allowable.

The just compensation to which the landowner is entitled, where part of his land is taken for a public use, includes the value of the ground condemned, and a due allowance for consequential damages, if any, to the remainder. p. 381

With respect to the property taken, the award must be based upon the actual market value at the time of the condemnation. p. 381

The market value of the land is to be estimated in reference to the uses and purposes to which it is adapted, and any special features which may enhance its marketability may properly be considered. p. 381

The question is not what the property is worth to the condemning party, but is confined to the question of what could probably be realized from its sale to any purchaser who might desire it for any or all of the purposes for which it is available. pp. 381, 385

Witnesses and jurors should not be permitted to enter the realm of speculation and swell damages beyond a present cash value under fair conditions, by fantastic visions of the future needs of growing communities. p. 388

The duty of the jury, in condemnation proceedings, is to award compensation to the property owner in money, and they

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can not, in lieu thereof, impose conditions upon the party condemning, or require the property owner to accept certain privileges. p. 389

Quære: Whether, in condemning water rights, it is proper for the Mayor and City Council of Baltimore to reserve to the property owner the right of pasture and water cattle, in the remainder of the land, through which flowed the water it then condemned. p. 390

Decided February 17th, 1915.

Appeal from the Circuit Court for Baltimore County.
(DUNCAN, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Wm. J. Ogden and Frank Gosnell, for the appellants.

S. S. Field, the City Solicitor, for the appellee.

URNER, J., delivered the opinion of the Court.

This is a condemnation proceeding for the acquisition by the City of Baltimore of certain land of the appellant, in Baltimore County, included in the area required for the storage and protection of a new water supply for the City to be impounded by an extensive dam in the valley of the Gunpowder River. The tract condemned contains about forty-four acres. It embraces the middle portion of the appellant's farm of one hundred and ninety acres, and lies along a stream called Peterson's Run, which, for the greater part of its course through the farm, will be absorbed in the waters of the reservoir. By the appropriation of ground in this proceeding the remainder of the appellant's land will

be divided into two disconnected tracts of approximately equal acreage. The buildings are located at the eastern end of the farm, and an outlet is provided by a roadway extending through the property to a public thoroughfare beyond its western limits. This private way crosses Peterson's Run by a bridge not far below the point where the stream enters the farm, but the land taken by the City will be necessarily flooded to such an extent as to prevent the use of the roadway and bridge at their present level. The condemnation of the intersecting tract, which is proposed by the petition to be acquired in fee simple, would also in itself have debarred the landowner from the use of the customary outlet, but it was provided by an amendment to the petition that the property required should be condemned subject to the obligation upon the part of the Mayor and City Council of Baltimore to construct a suitable bridge over Peterson's Run, and a suitable road from each side of the bridge to the outlines of the property sought to be condemned, along the line of the present way, the new road and bridge to be equally as good as those now existing, and to be at a sufficient elevation to furnish a safe and solid roadway connecting the separated portions of the farm, and to be for the perpetual use and benefit of the owners of the remaining land, by whom, however, it was to be maintained. By the same amendment it was further stipulated that the condemnation should be subject to the reservation in behalf of the landowner, his heirs or assigns, of the right of access to the Run above the roadway for all domestic purposes, including the cutting of ice and the right to have live stock, except hogs, resort to that portion of the stream.

The petition was thus amended, by leave of the Court, after the jury had been impaneled and had viewed the premises. Objection to the amendment was taken by a motion *ne recipiatur*, which was overruled; and a formal exception to this action was reserved and constitutes the first bill of exceptions in the record. The appellant complains of the modification referred to mainly on the ground that it is

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inconsistent with a condemnation in fee simple, to which the proceedings are in terms directed, and seeks to accomplish by the provisions stated the partial satisfaction of damages which are claimed to be legally demandable as a whole in money. Other exceptions were reserved to the refusal of the Court below to allow the defendant to show that the land being condemned has special features which give it an independent value as a reservoir site. The appeal by which the questions we have indicated are brought before us for determination has been taken by the defendant from a judgment entered upon the inquisition as returned by the jury awarding him damages to the amount of \$15,967.00.

In the argument of the case in this Court the subject first considered was the propriety of the exclusion of evidence as to the adaptability of the land for reservoir purposes, and we will adopt the same order of discussion.

The just compensation to which the landowner is entitled, where part of his land is taken for public use, includes the value of the ground condemned and a due allowance for consequential damages, if any, to the remainder. *Patterson v. Baltimore*, 124 Md. 153; *Baltimore v. Megary*, 122 Md. 20; *Baltimore v. Garrett*, 120 Md. 608; *Ridgely v. Baltimore*, 119 Md. 567. With respect to the property taken the award must be based upon its actual market value at the time of the condemnation. *Norris v. Baltimore*, 44 Md. 607; *Moale v. Baltimore*, 5 Md. 314; *Tide Water Canal Co. v. Archer*, 9 G. & J. 479. The rule is that the market value of the land is to be estimated with reference to the uses and purposes to which it is adapted, and that any special features which may enhance its marketability may properly be considered. But the fact that the land is needed for the particular object sought by the condemnation is not to be regarded as an element of the value to be ascertained. The question is not what the property is worth to the condemning party, but what could probably be realized from its sale to any purchaser who might desire it for any or all of the purposes for which it is available.

In 15 Cyc. 757, it is said: "The true rule is that any use for which the property is capable may be considered, and if the land has an adaptability for the purposes for which it is taken, the owner may have this considered in the estimate as well as any other use for which it is capable. Thus, in proceedings to condemn land for railroad purposes, for a bridge site, or for a reservoir or water supply, it may be shown that the land has an especial availability which would render it valuable to any one who might wish to purchase it for railroad purposes, for a bridge site, or for the purpose of a reservoir or water supply, and the owner may insist upon this availability of his land for the particular purpose as an element in estimating its value."

In *Mississippi and Rum River Boom Co. v. Patterson*, 98 U. S. 403, where three islands in the Mississippi River were being condemned for use in the construction of a boom, and the owner desired to have their special availability for such use considered in the estimate of his damages, it was said: "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses."

It was held in *Sargent v. Merrimac*, 196 Mass. 171, where a landowner was seeking compensation for property taken as a source of municipal water supply, that: "The market value to which the petitioner was entitled was made up of the value of the land apart from its special adaptability for water supply purposes, plus such sum as a purchaser would have added to that value because of the chance that the land in question might be some day used as a water supply." The decision in *Moulton v. Newburyport Water Co.*, 137 Mass. 163, was to the same general effect.

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In *Spring Valley Waterworks v. Drinkhouse*, 92 Cal. 528, it was held to be proper to show that land which was being condemned for a reservoir site was so situated as to be peculiarly adapted to such use. The same theory was adopted in the case of *Alloway v. Nashville*, 88 Tenn. 510, 8 L. R. A. 123, where land was condemned for a reservoir, and it was said that the market value to which the owner was entitled "includes every element of usefulness and advantage in the property. If it be useful for agriculture or for residence purposes; if it has adaptability for a reservoir site, or for the operation of machinery; if it contains a quarry of stone, or a mine of precious metals; if it possesses advantage of location, or availability for any useful purpose whatever, all these belong to the owner, and are to be considered in estimating its value. It matters not that the owner uses the property for the least valuable of all the ends to which it is adapted, or that he puts it to no profitable use at all. All its capabilities are his, and must be taken into the estimate."

An opinion delivered by LORD CHIEF JUSTICE ALVERSTONE, in *re Gough and Aspatia, Silloth and District Joint Water Board* (1904), 1 K. B. 422, approves as correct the following statement of WRIGHT, J., whose action was under review: "If there is a site which has peculiar advantages for the supply of water to a particular valley or a particular area of any other kind, or to all valleys or areas within a certain distance, if those valleys are what might be called natural customers for water by reason of their populousness and of their situation,—if the site has peculiar advantages for supplying in that sense—apart from value created or enhanced by any Act of Parliament or scheme for appropriating the water to a particular local authority, I think it may be taken that there is a natural value in the site for the purposes of water supply, and that it should be taken into consideration."

The case of *Brown v. Forest Water Co.*, 213 Pa. St. 440, also recognized the rule that the special availability of land for reservoir or water supply purposes is a proper element

of value to be proven. It was said in the opinion: "The defendant can not properly complain of the admission of evidence that the property taken by it was adapted to reservoir purposes, from the natural formation of the land, the amount of water flowing over it, and its proximity to certain towns. All these matters were elements entering into the market value of the property."

The general principle of the above citations is applied in numerous cases collected in *Lewis on Eminent Domain*, 3 ed., sec. 707, and in notes to decisions reported in *Missouri K. & T. R. R. v. Roe*, 15 L. R. A., N. S. 679; *Sargent v. Town of Merrimack*, 11 L. R. A., N. S. 996; *Brown v. Weaver Power Co.*, 3 L. R. A., N. S. 912, and 24 *Amer. and Eng. Annotated Cases*, 1236.

In the case of *Callaway v. Hubner*, 99 Md. 529, this Court, in passing upon exceptions to the ratification of a sale of land reported by trustees, and in determining whether the sale was improvident, had occasion to consider the availability of the property for reservoir purposes as entering into the market value, and as affecting the question as to the propriety of the sale, which had left that element out of view. The opinion by JUDGE PEARCE cited and quoted from the decisions in *Matter of Furman Street*, 17 Wendell, 669; *Young v. Harrison*, 17 Ga. 30, and *Boom Co. v. Patterson*, 98 U. S., *supra*, in support of the proposition that the availability of property for particular uses should be taken into consideration when its value is being estimated. It was accordingly decided that the value of the land as a reservoir site should have been considered by the trustees, and that as they sold the property in disregard of the special advantage which it thus possessed, and at a much lower price than might otherwise probably have been obtained, the sale could not be approved. It was remarked that the trustees had made no effort to sell the land to the City of Baltimore, although they knew it was in the market for a reservoir site in that locality, and disposed of the property as if it were

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ordinary unimproved ground. In this connection it was said, in the language of the lower Court, which was quoted with approval: "Had the city proceeded by condemnation (as it might have done), the peculiar value of this land as a reservoir site would have been a fact to be considered by the jury in assessing its value."

The case of *McGovern v. New York*, 130 N. Y. App. Div. 350, 195 N. Y. 573, 229 U. S. 363, is cited as tending to support the opposite theory. But an examination of the decision rendered in that case, by the courts of New York and by the Supreme Court of the United States, has satisfied us that they are not opposed to the general trend of authority on the subject under inquiry. In the opinion delivered by the Appellate Division of the Supreme Court of New York it was said that the landowner, whose property was being taken as part of the site of the Ashokan Reservoir for New York City, was entitled to receive its market value for any purpose to which it was adapted. The principle was distinctly recognized that when land is shown to have a market value for some particular use, its adaptability to that use can be taken into account in the estimate of the compensation to be awarded. In that case the landowner did not attempt to prove that the value of the property had been increased by its availability for reservoir purposes before the commencement of the condemnation proceedings. It was pointed out that there was no evidence "of any circumstance by which the value of the parcel in question, as a part of a natural reservoir site, could be estimated or determined." In the absence of such evidence it was held that the owner had received the benefit of everything which enhanced the value of his property except the increase caused by its appropriation for the use of the city. The action of the Appellate Division in sustaining the award was affirmed by the Court of Appeals of New York without the delivery of an opinion. The case was then appealed to the Supreme Court of the United States upon the question as to whether the ruling

on the measure of compensation amounted to a taking of property without due process of law. This question was answered by the Supreme Court in the negative, and Mr. JUSTICE HOLMES, who delivered the opinion, observed: "The enhanced value of the land as part of the Ashokan Reservoir depends upon the whole land necessary being devoted to that use. There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation."

It is apparent, therefore, that the case last cited is consistent with the theory of the other decisions referred to that any particular capability which actually enhances the value of the property independently of the demand created by the condemnation, should be considered in the estimate to be made of the market value which constitutes the measure of compensation. In the case now before us the defendant offered to prove the existence of such a condition with reference to the land involved in this proceeding. It was testified by the Sanitary Engineer of the State Board of Health that he had examined the defendant's property in respect to its contour and drainage, and it was then proposed to prove by the witness that by reason of the topographical features of the ground a storage reservoir could readily be constructed there with a capacity of 1,200,000,000 gallons, that there was a market at that time for such a reservoir, that the site will be destroyed by the taking of the property sought to be condemned, and that the land has an independent value as a reservoir site. The reason for the exclusion of the evidence thus proffered is not indicated in the record, but the argument against its admission was that the land in question could not have any value as a reservoir site, apart from the object of the present condemnation, because its owner would have no right to impound and distribute the waters of the

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stream flowing through it without the consent of the City of Baltimore as the lower riparian proprietor, and that as the City needs the stream as a source of supply for its people, the storage of the water for the use of other consumers would be legally impracticable. In order to sustain this contention we should have to hold in effect that the evidence offered to be introduced, though theoretically admissible under the rule we have discussed, must nevertheless be excluded in this instance on the ground that the special element of value to which it refers could not possibly have any existence in fact, and is, therefore, incapable of being proven. The record, however, does not justify such a conclusion. It affords us no sufficient reason for making a formal and final declaration that the defendant's land cannot conceivably have any peculiar availability for the purposes of a reservoir in view of the acquisition by the City of the rights of a lower riparian owner. It would not seem reasonable to hold that land situated on a watercourse can under no conditions have any inherent value as a reservoir site unless it is held under a common ownership with all the other properties through which the further course of the stream extends. If it affirmatively appeared that the use of the tract in question for such a purpose would necessarily have involved an invasion of the riparian rights of the City, which it has held for many years, there could be no difficulty in eliminating the element of reservoir value from further consideration. But the proffer is distinctly made to prove that the land has an *independent* availability for such use, and the record does not conclusively show that competent evidence to that effect could not be adduced. If we were to preclude the inquiry which the defendant proposes on that subject, we could not be certain, as the case is now presented, that his rights were receiving the full measure of recognition to which they may be justly entitled. In our opinion, the defendant should have the opportunity he desires to prove, if he can, that the property being condemned has an independent value and marketability as a reservoir site. If testimony had been allowed

to be introduced for that purpose, and had appeared to be merely speculative or otherwise legally insufficient to support the theory upon which it was admitted, it could have been stricken out or withdrawn from the consideration of the jury by suitable instructions. As CHIEF JUSTICE RUGG said in *Smith v. Commonwealth*, 210 Mass. 259, where a somewhat similar question was under discussion: "Witnesses and jurors should not be permitted to enter the realm of speculation and swell damages beyond a present cash value under fair conditions of sale by fantastic visions as to future exigencies of growing communities." But we can not determine in advance that the evidence here proffered would be too inconclusive to be considered, and we are, therefore, unable to concur in the ruling by which the offer was unconditionally refused.

The other question to be considered relates to the amendment of the condemnation proceedings by the provision we have noted reserving to the landowner, and his successors in title, a right of access to the waters of Peterson's Run at the place and for the purposes stated, and imposing upon the condemning agency the duty of elevating and reconstructing the road and bridge upon which the eastern portion of the land is dependent for an outlet to the public highway, and reserving to the present and future owners of the property a perpetual right to the use of the way thus preserved. It was, of course, the object of these stipulations to mitigate the damages occasioned to the defendant's remaining land by the appropriation of the part required for the purposes of the condemnation. The property taken was condemned in fee simple, and it will be flooded to such an extent as to require, as already stated, the raising of the road and bridge if they are to be further utilized. The effect of the amendment in this regard is not to reserve from the condemnation an existing and available roadway over the land, but to provide a new way upon a higher level in lieu of the one which the waters of the reservoir will render impassable. Such a substitution, according to the terms of the amendment,

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involves the construction of the new roadway and bridge by the City and their future maintenance by the owner of the land to which the way is intended to be appurtenant.

As the condemnation of a part of the defendant's land entitles him, in addition to the value of the property taken, to compensation for any injury to the value of the remainder resulting from the use of the condemned portion for the purposes of its acquisition, the question we are now to decide is whether the consequential damages thus accruing to the defendant can be partially satisfied by the reservation of the rights and the creation of the obligations specified in the amendment.

In *Pennsylvania R. R. Co. v. Reichert*, 58 Md. 261, where the question before the Court grew out of the fact that part of a lot of ground owned and occupied by a coal dealer had been condemned for a railroad right of way, and the inquisition as returned required the condemning company to erect for the lot owner a trestle to be used for moving coal, in place of one which would be removed in the building of the railroad, and imposed other conditions, it was said by CHIEF JUSTICE BARTOL to be a correct statement of the law, as quoted from *Mills on Eminent Domain*, section 112, that: "Compensation is ordinarily to be made in money, yet reservations of rights to owners are favored, and the condemning party may ratify an award, a part of which requires certain improvements to be made for the benefit of the owner. The reservation of rights to the owner is only carrying out the spirit of the law, that the public improvement shall be made with the least damage to private individuals. These conditions and reservations cannot be fixed against the will of the parties." This quotation was partially repeated in the case of *Russell v. Zimmerman*, 121 Md. 339.

In 15 *Cyc.* 898 it is said to be "the duty of the jury or commissioners to award compensation to the property owner in money, and they cannot in lieu thereof impose conditions upon the party condemning the property, or require the property owner to accept certain privileges." The rule is

stated to the same effect in *Lewis on Eminent Domain*, 3rd Ed., sec. 756, and has been applied in *Chicago, M. & St. P. R. Co. v. Melville*, 66 Ill. 329; *Central Ohio R. Co. v. Holler*, 7 Ohio St. 220; *Chesapeake and Ohio R. Co. v. Halstead*, 7 W. Va. 301; *Hill v. Mohawk and Hudson R. R. Co.*, 7 N. Y. 152; *Chicago, etc., R. R. Co. v. McGrew*, 104 Mo. 282.

In a case like the present, where part of the farm on which the buildings are located is apparently dependent for an outlet upon the roadway over the portion of the land which is being condemned, it seems entirely reasonable that the way should be preserved, if possible, in order to promote the convenience of the landowner and to reduce the extent of the consequential injury to the property. But as the defendant is objecting to the provisions which seek to accomplish that result, and as he is entitled to assume such a position by virtue of the rule stated in the decisions of this and other courts, we are unable to sustain the inquisition in its present form. Upon the remanding of the case it may be practicable to restrict the interest or area to be acquired, or modify the terms of the condemnation, so as to avoid the difficulty now presented. The brief of the appellee suggests that the objection could be obviated, and there is ample authority to permit an amendment for that purpose. Code, Art. 33A, sec. 4.

The reservation of an unrestricted right to the present and succeeding owners of the land not condemned to have their cattle resort to the waters of Peterson's Run need not be separately discussed, but it may be observed that the propriety of this provision may be open to question when applied to a municipal water supply, and the right would at all events be precarious in view of the power vested in the State Board of Health, by Chapter 810 of the Acts of 1914, to prevent the pollution of the waters of the State in so far as may be necessary for the protection of the public health or comfort.

It is urged on behalf of the City that the objection we have considered, as to the reservation and conditions created

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by the amendment to the petition, was not raised in the Court below, and is, therefore, not a proper subject for review on appeal. The motion *ne recipiatur* denied the right of the City to modify the petition by inserting the stipulations in question, and the reasons assigned were that the proposed amendment was too vague and uncertain, that it was inconsistent with the petition as filed, that it was offered too late, and that it was not germane to the issue upon which the jury had been sworn. The objections thus interposed were sufficiently comprehensive to entitle the defendant to have this Court pass upon the question here presented.

The further contention is made that the damages assessed by the jury afford the defendant more than adequate compensation upon any of the theories advanced, and that he has consequently not been injured by the rulings to which he objects. There is the usual wide diversity of opinion in the testimony contained in the record as to the proper amount of damages to be awarded the defendant, but some of the estimates exceed the sum ascertained by the verdict, and we are not at liberty to rule as a matter of law, upon the evidence before us, that the allowance made by the jury was so obviously excessive from any point of view, as to render non-prejudicial the rulings we have under consideration.

There is an exception in the record which relates to the instructions granted at the instance of the City, but the questions thus raised are answered in effect by the views we have already expressed.

Judgment reversed, with costs and cause remanded.

THE FREDERICK COUNTY NATIONAL BANK

*vs.*JOSEPH B. DUNN ET AL., PARTNERS, TRADING AS
JOSEPH B. DUNN & SONS.*Mechanics' liens: notice of claim of lien; time for—; several contracts; time for filing liens; must be according to each contract; estoppel on owner, by ruling of architect.*

A supervising architect is the agent of the owner. p. 394

Unless notice of an intention to claim a mechanics' lien is given within the time prescribed by section 11 of Article 63 of the Code, no lien can be maintained. p. 395

Where there are two separate and distinct contracts for labor or materials, although they have relation to the same building, they can not for the purposes of the lien be coupled together, so as to extend the date for the filing of the lien down to the time the last material was furnished or the last labor performed, under the later contract. pp. 395-396

But as to each contract, the time for the giving of a notice, or the filing of a lien, is dependent for its being in season as to the particular contract under which the work is done; and conversely where there is a single entire contract, the time is to be computed from the last material delivered or work done, in connection with the contract, even though that be small in amount, or far removed in point of time from the balance of the work. p. 396

For making alterations to a bank there was only one single contract; the supervising architect, by the contract, was made the judge of any dispute about the interpretation of the contract; a sub-contractor thought he had completed the work under the contract, but the architect ruled that some work under the contract was unfinished; the contractor and sub-contractor, by agreement among themselves, did the work; the sub-contractor filed his notice of his intention to claim his lien for the work; if the work had been completed as the sub-con-

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tractor claimed, the time to claim a lien had expired; but, as the architect—the agent of the owner—had ruled that the contract had not been completed, it was *held*, that the owner was estopped, and that the lien should be allowed, as it had been filed within the statutory time of doing the work. p. 397

Decided February 12th, 1915.

Appeal from the Circuit Court for Frederick County. In Equity. (URNER, C. J., and WORTHINGTON, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

Benjamin F. Reich and *George A. Pearre, Jr.*, (with whom was *John S. Newman* on the brief), for the appellant.

Aubrey Pearre, Jr., and *Milton G. Urner, Jr.*, (with whom were *Milton G. Urner* and *Barton, Wilmer & Stewart* on the brief), for the appellees.

STOCKBRIDGE, J., delivered the opinion of the Court.

When John K. McIver was awarded the contract for remodeling the Frederick County National Bank building he sublet portions of the work to be done. Joseph B. Dunn & Sons had submitted an estimate for doing the marble and tile work in the building, in which the various items to be furnished and performed by them were specified, and a lump sum named for these of \$1,760.70. This proposition was made on April 9th, 1912, before the contract was actually awarded to McIver. Some discussion appears to have arisen between Dunn and McIver whether at one point marble or tiling was to be used, owing to an apparent ambiguity of the specifications. Mr. Leach, the architect, was called on to construe the language, which having been done resulted in a reduction of the price named by Dunn from \$1,760.70 to \$1,750, and on this basis the proposal of Dunn was accepted on February 27th, 1913. The performance of the work was begun by Dunn about April 7th, 1913, and completed, ac-

according to the interpretation placed by Dunn & Sons on the contract by May 19th, on which date their workmen left Frederick and returned to Baltimore. A bill was rendered by Dunn & Sons to McIver promptly thereafter, for the contract price of \$1,750.

When Dunn's employees left Frederick there was one toilet room, located between the first floor and the basement, in which no tiling had been done either for the floor or side walls. This had been omitted for the reason that in the belief of Dunn & Sons it was not included in the work which they had contracted to do, and did not appear in the plans and specifications attached to and made a part of the contract between McIver and the bank, with which plans and specifications they were entirely familiar.

The architect was Alfred C. Leach; he "made the plans and specifications and supervised the work for the owners," according to his own testimony. He was thus for many purposes the agent of the owner. A month or six weeks after Dunn's employees had left the building, completed as they supposed, Leach asked McIver, the general contractor, why he didn't tile that toilet, and he (McIver) said it wasn't in the contract. Leach replied that it was in the contract and would have to be tiled. McIver communicated with Dunn in regard to the tiling of this room and Dunn took the same position that McIver had taken, that the tiling of this toilet was not included in the plans and specifications of the contract. This raised an issue between Leach, representing the owner, and the contractor. Such a contingency was provided for in the contract as follows:

"Should any discrepancy exist between the plans and specifications or any parts of either, or should the language of any part of the contract or specifications be ambiguous or doubtful, the architect shall decide as to the true intent and meaning, and all questions, disputes or differences as to any part or detail of the work shall be referred to the architect for his decision."

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The next steps are thus described by Mr. McIver in his evidence: "The architect ruled we should, insisted that we should, and I did it to avoid litigation, to get my work through and have it accepted, and I did it without compensation from the bank." He does not testify, however, that Dunn & Sons ever acquiesced in the decision of Leach, and he distinctly says that Dunn did all of the work required of him under his contract, but because of Leach's decision McIver made an arrangement with Dunn to do the tiling of the floor and walls of this toilet, for which McIver was to pay the sum of \$91, or about half of the total cost of the work to be performed, and Dunn assumed the balance. This last work was done between the 21st and 26th of July, and on the last named date a bill was rendered to McIver by Dunn for the \$91. Both McIver and Leach testify that the work done by Dunn was in every way satisfactory.

Having received from McIver only \$350 up to August 7th, Dunn & Sons served a notice on the bank of their intention to claim a mechanics' lien, and on the following day a lien was filed. The claim consisted of three items, the original contract price of \$1,750, the delivery on May 21st of five bags of cement, \$2.50, and the tiling of the basement toilet in July, \$91.

The time within which notice of an intention to claim a mechanics' lien must be given is fixed by Article 63, section 11 of the Code, and where notice is not given within the time prescribed no lien can be maintained. In this case if the proper date from which to compute the time was the doing of the last work in May, the lien was filed too late to be given effect, while if the proper date was July 26th it was in ample season.

It is firmly settled by the decisions, both in this State and elsewhere, that if there are two separate and distinct contracts, even though they have relation to the same building, they can not for the purposes of a lien be coupled together so as to extend the date for the filing of the lien down to the

time of the last material delivered or work performed under the latest contract, but that as to each, the time for the giving of a notice or the filing of a lien is dependent, for its being in season upon the particular contract under which the work is done, and conversely that when there is but a single entire contract, the time is to be computed from the last material delivered, or work done, in connection with that contract, even though that be small in amount or far removed in point of time from the balance of the work. *Ger. Luth. Church v. Heise*, 44 Md. 469; *Watts v. Whittington*, 48 Md. 356; *Miller v. Barroll*, 14 Md. 173; *Maryland Brick Co. v. Spilman*, 76 Md. 341; *Fulton v. Parlett*, 104 Md. 62; *Phillips on Mechanics' Liens*, sec. 229; *Farnham v. Richardson*, 91 Me. 559; *McIntire v. Trautner*, 63 Cal. 429; *Miller v. Wilkin-son*, 167 Mass. 136.

The crucial question in the present case, therefore, is whether the contract was an entire one, or whether there were two separate and distinct contracts. There is no suggestion that the bank ever made but one contract, or that anyone acting on the part of the bank did so. The question in this case seems to have arisen because of the insistence on the part of the architect, who for that purpose was the agent of the bank, that the work which was not done until the month of July was a part of the original contract between the bank and McIver, and no matter for what reason, it is also clear that this construction was acquiesced in by McIver. There was no new agreement between the bank on the one hand and the contractor or sub-contractor on the other. The arrangement between McIver and Dunn is testified to have been in the nature of a compromise rather than a clear, definite contract. It was a matter of adjustment between themselves in which the bank was in no way involved or affected. So far as the bank had any occasion whatever to know, the decision of their agent, Leach, was accepted and fully acquiesced in by both McIver and Dunn, and the work which remained to be done in July was work

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which was fully provided for in the contract and which it had a right to require.

This is not a case where a material man, by a small delivery of material long after he has complied with his agreement, seeks to extend the time within which he can claim the advantage of the statute. Dunn had left the work in May believing it to have been fully completed, and he is afterwards called upon, at the instance of the bank, not to do some new and distinct work, but to complete work which he had agreed to do under his contract. If it was work which should have been done under that contract, then the contract was not fully performed until the latter part of July, and the time within which he could give notice under the statute ran from the completion of the work in July, and that it was so included, had been decided by the architect, who was expressly empowered to make the decision. The notice given, therefore, on the 7th of August was in ample season to comply with the statute.

There is still another reason which leads to the same conclusion. There are a large number of cases which lay down the rule that where the owner insists that a building is not completed and that he will not accept it, owing to some imperfection, he is estopped thereafter from denying that the building was completed prior to the date of correcting such imperfection. *Hubbard v. Lee*, 102 Pac. 528; *McIntire v. Trautner*, 63 Cal. 429; *Rieflin v. Grafton*, 115 Pac. 851; *Minn. Trust Co. v. Gt. Northern R. R.*, 74 Minn. 30; *Shaw v. Fjellman*, 72 Minn. 465; *St. Louis Natl. Stock Yards v. O'Reilly*, 85 Ill. 546.

A case very similar to the present one and in which this rule was laid down is that of *Stidger v. McPhee*, 62 Pac. 332. As applied to the present case, the rule is concisely this—that the bank through its agent having insisted that the tiling of the particular toilet room was embraced within the terms of the original contract so as to avoid the payment of any charge as for extra work upon it, will not now be heard

to claim that it was not included in that contract so as to make a new contract requisite for its completion.

With respect to the item in the account for \$91 no lien can be allowed for that. The work for which that account was rendered if properly included in the original contract was covered by the contract price of \$1,750, and if not properly included in that was nevertheless so accepted by both the owner and contractor McIver, and any further agreement which he may have made with Dunn in respect to it, was a personal arrangement for which no lien was maintainable.

The item of \$2.50 for cement was hardly referred to in the testimony given in the case nor in the argument. This appears to have been furnished in May, and unless it was required for the performance of the contract, the notice was insufficient, and if it was required in connection with that contract was covered by the general contract price of \$1,750, but there is one other factor affecting this item. Payments aggregating \$350 were made by McIver to Dunn on account of the work done under the sub-contract. There do not appear to have been any specific directions given as to the application of this money when it was paid, and Dunn saw fit to make the item of \$2.50 a charge against the money which he received, and no objection was raised to this by McIver, and under such circumstances no good reason appears for disturbing the decree of the Circuit Court for Frederick County on account of this item.

There was some reference made in the briefs to the fact that Dunn had received a note of McIver for \$1,000, but that can in no way affect this controversy, as the proof fails to show that the note was received in payment of that amount. *Code*, Art. 63, sec. 3; *Brick Co. v. Spilman*, 76 Md. 337; *Wix v. Bowling*, 120 Md. 265; *McLean v. Wiley*, 176 Mass. 233.

The decree appealed from will accordingly be affirmed.

Decree affirmed, with costs.

Md.]

Syllabus.

EDMUND J. WACHTER, JOHN KRONMILLER AND
RUXTON M. RIDGELY, THE ELECTION SUPER-
VISORS OF BALTIMORE CITY,

vs.

JAMES McEVOY.

*Mayor of Baltimore City: Qualifications for office; member of
Police Board not eligible during term for which he
was appointed; "term of office"; resig-
nation during term. Statute:
Repeal by implication.*

Chapter 512 of the Acts of 1914, repealing section 16 of the City Charter (Acts of 1898, Chapter 123), and amending the law as to the length of time of residence in the City of Baltimore necessary to render eligible a candidate for the office of Mayor for that city, and omitting the requirement of his having been assessed with property and of having paid taxes thereon for two years preceding the date of the election at which he is a candidate, does not have the effect of repealing Chapter 15 of the Acts of 1900 (which it does not mention), or of repealing any of the former statutes declaring that no member of the Board of Police Commissioners of Baltimore City shall be eligible to an election or appointment to the office of Mayor during the term for which he was appointed to such board.

pp. 405-406

The term of office for which a member of the Board of Police Commissioners is appointed is not ended by his resignation therefrom; and the fact that a member of such board resigns

before the expiration of the time for which he was appointed does not render him eligible for the office of Mayor of Baltimore City. pp. 407-408

Repeals of statutes by implication are not favored. p. 406

It is only when they are clearly irreconcilable and not susceptible of any such fair interpretation as will admit of their standing together that such repeal will be declared. p. 406

It is the function of courts to interpret legislation, and not to supply its omissions. p. 407

Decided February 17th, 1915.

Appeal from the Baltimore City Court. (GORTER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UNER, STOCKBRIDGE, and CONSTABLE, JJ.

David M. Newbold, Jr., and Enos S. Stockbridge, for the appellants.

By special leave of the Court of Appeals, *Charles J. Bonaparte* and *J. Southgate Lemmon*, on behalf of the Baltimore Reform League, filed a brief for the appellants.

Joseph C. France and Edwin G. Baetjer, for the appellee.

BURKE, J., delivered the opinion of the Court.

The appellants on this record constitute the Board of Supervisors of Elections of Baltimore City.

On the sixth day of January, 1915, the appellee filed in the Baltimore City Court a petition in which he prayed that a writ of mandamus be issued against the appellants

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commanding them to receive his certificate of candidacy as a candidate for the nomination by the Republican party for the office of Mayor of the City of Baltimore, and also commanding them to have printed upon the ballots to be used or voted by affiliated voters of said Republican party in said primary election of said party to be held in the City of Baltimore on the sixth day of April, 1915, the name of your petitioner, James McEvoy, as a candidate for the Republican nomination to the office of Mayor of the City of Baltimore. On the 7th day of January, 1915, the Court passed an order directing the writ to issue as prayed. From that order this appeal was taken.

The first paragraph of the petition alleged that on the sixth day of April, 1915, there would be held in the City of Baltimore a primary election at which the duly qualified voters affiliated with the Republican party would nominate a candidate for the office of Mayor of the City of Baltimore; and that the petitioner, being duly affiliated as a member of the Republican party, and being desirous of becoming a candidate for said office in said primary election, did, on the 24th day of December, 1914, present to the respondents, the Board of Supervisors of Elections of Baltimore City, his certificate of candidacy for said office in the form required by said board and in conformity with the provisions of the election laws of the State of Maryland, together with the sum of one hundred dollars, as provided by law, in order that his name might be printed as a candidate for the said office of Mayor upon the official ballot to be used by the voters of the Republican party at said primary election; that the Board of Supervisors of Elections refused to accept his certificate of candidacy, and refused to have his name printed on the ballots to be used at said primary election, and returned to him his certificate and said sum of one hundred dollars, averring that the petitioner was not eligible to become a candidate for said office or entitled to have his name printed on said ballot, for the reason that he had formerly, namely, until December 23, 1914, been a member of the

Board of Police Commissioners of Baltimore City. That the appellants based their refusal on the provisions of Chapter 15 of the Acts of 1900, re-enacting section 740 of Article 4 of the Code of Public Local Laws, entitled Baltimore City, sub-title Police Commissioners, which provides, among other things, that: "None of said Commissioners shall be eligible to an elective or appointed office during the term for which he was appointed, except under the militia laws of the State, or where the qualifications for such office are prescribed by the Constitution." He filed with his petition, as a part thereof, a copy of his certificate of candidacy and a copy of the ruling or opinion of the Board of Supervisors of Elections declining to accept the certificate.

In the second paragraph of the petition it is alleged that the petitioner had previously served as a member of the Board of Supervisors of Elections of Baltimore City, and that on the second day of January, 1914, he qualified as a member of the Board of Police Commissioners of Baltimore City, having been appointed to that office by the Governor of the State of Maryland, to serve until the second Monday of May, 1914, in the place of Morris A. Soper, who had resigned to become Chief Judge of the Supreme Bench of Baltimore City; that in the month of February, 1914, and during the session of the Legislature, the petitioner was appointed a member of the Board of Police Commissioners by the Governor for the term of two years, beginning on the first Monday of May, 1914; such appointment having been duly confirmed by the Senate. That he qualified as a member of said board on the fourth day of May, 1914, and continued as such until the 23rd day of December, 1914, when the Governor accepted his resignation and appointed his successor, who has qualified and is now serving as a member of said board.

The third paragraph alleged that the petitioner possessed all the qualifications to be possessed by a candidate for the office of Mayor of the City of Baltimore prescribed by Chapter 512 of the Acts of 1914.

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The fourth paragraph alleged that he is eligible for the office of Mayor of the City of Baltimore, and that the refusal of the Board of Supervisors of Elections to receive his certificate of candidacy and his payment of one hundred dollars, and their rejection of the same, and their refusal to place his name on the official ballot to be voted at said primary election, constitute a violation of their duty in the premises.

The appellants answered the petition and admitted the allegations contained in the first and second paragraphs thereof; they admitted the allegation contained in the third paragraph of the petition "in so far as it alleges that the said petitioner possesses the specific qualifications for the office of Mayor of Baltimore as prescribed by Chapter 512 of the Acts of 1914 of the General Assembly, mentioned in said paragraph, but in view of section 740 of Article 4 of the Code of Public Local Laws of Maryland, as set out in paragraph one of said petition, deny that the said petitioner is eligible to the office of Mayor of Baltimore." They denied the allegations contained in the fourth paragraph of said petition, and denied that the petitioner was eligible to the office of Mayor of Baltimore, and affirmed that their refusal to receive the certificate of candidacy, and its accompanying deposit of one hundred dollars, and their rejection of the same, and their refusal to place his name on the official ballot to be voted at the primary election, is not a violation of their duty, but was fully justified in law. The petitioner demurred to the answer, and the demurrer was sustained, and the appellants declining to amend their answer the order appealed from was passed.

The Act of 1898, Chapter 123, known as the New City Charter, passed under the power contained in the Eleventh Article of the Constitution, prescribed the qualifications for the office of Mayor of Baltimore City, in this language contained in section 16 of that Act: "The inhabitants of the City of Baltimore qualified to vote for members of the House of Delegates shall, on the Tuesday next after the first Monday in May, eighteen hundred and ninety-nine, and on the

same day and month in every fourth year thereafter, elect by ballot a person of known integrity, experience and sound judgment, over twenty-five years of age, a citizen of the United States, and five years a resident of said City next preceding the election, and assessed with property in said City to the amount of two thousand dollars, and who has paid taxes thereon for two years preceding his election, to be Mayor of the City of Baltimore; but the Mayor chosen at the first election under this section shall not enter upon the discharge of the duties of the office until the expiration of the term for which the present Mayor was elected; unless the said office of Mayor shall become vacant by death, resignation, removal from the State or other disqualification of the present Mayor."

By sections 740 to 764, inclusive, of the same Act, provision was made for the organization of the police force of Baltimore City, and for the election of a Board of Police Commissioners for the City of Baltimore. In section 741 the following disqualification for office was imposed upon the Police Commissioners: "And neither of said Commissioners shall be eligible to an elective or appointed office during the term for which he has been elected, except under the militia laws of the State."

It would seem to be obvious that it was the intention of the Legislature by the language quoted from section 741 to limit and qualify, to the extent therein stated, the qualifications for Mayor specified in section 16, and that the eligibility of a person for the office of Mayor was to be determined by section 16 and section 741, and that a person disqualified under either section was ineligible to that office. Thus construed it is manifest that there is no repugnancy or inconsistency between the sections, and that they may stand together, as the Legislature evidently intended they should.

The Act of 1900, Chapter 15, repealed and re-enacted sections 740 and 741 of the Act of 1898, Chapter 123. It provided for the appointment by the Governor of a Board of Police Commissioners for the City of Baltimore instead

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of election "by the joint meeting of the two houses of the General Assembly" as provided by the Act of 1898. It changed the term of office of the Police Commissioners, but continued the disqualification contained in section 741 of the Act of 1898. The provisions of the Act with respect to these subjects are here transcribed: "None of said Commissioners shall be eligible to an elective or appointed office during the term for which he was appointed, except under the militia laws of the State, or where the qualifications for such office are prescribed by the Constitution." The provision that a Police Commissioner was eligible to an office whose qualifications were prescribed by the Constitution was unnecessary, as it was not within the power of the Legislature, where the Constitution had defined the qualification of an officer, to change, or superadd new or additional qualifications. So it may be said that the provisions as to the disqualifications of Police Commissioners contained in the Act of 1900, Chapter 15, are legally and substantially identical with those stated in section 741 of the new charter.

The Act of 1914, Chapter 512, repealed section 16 of the City Charter (Ch. 123 of the Acts of 1898), which prescribed the qualifications for the office of Mayor. The only change made in the prior Act was to require a residence of ten years in the City instead of five years, and to render eligible any person "who has hitherto held elective, executive, or legislative office under the government of the United States, or the State of Maryland, or the City of Baltimore, to be Mayor of the City of Baltimore," irrespective of whether he was assessed with property and paid taxes thereon for two years preceding his election. This Act makes no reference to the Acts of 1900, Chapter 15. It is entitled an Act to repeal section 16, Chapter 123 of the Acts of the General Assembly of Maryland of 1898, title "Charter," sub-title "Mayor," and to re-enact the same with amendments. It left the Act of 1900 in full force and is consistent with it, as section 16 of Chapter 123 of the Acts of 1898 was consistent with section 741 of the same Act. They are cumu-

lative acts upon the same subject, and must be read together to determine the appellee's eligibility for the office of Mayor.

We cannot, therefore, agree with the contention that Chapter 15 of the Acts of 1900, in so far as the appellee may be disqualified thereunder, was repealed by Chapter 512 of the Acts of 1914.

Repeal of a former by a subsequent statute, by mere implication, is never favored by the courts, and it is only when they are clearly irreconcilable and not susceptible of any such fair interpretation as will allow of their standing together, that such repeal will be declared. *Cumberland v. Magruder*, 34 Md. 381; *Snowden v. State*, 69 Md. 203; *McCracken v. State*, 71 Md. 150; *Beard v. State*, 74 Md. 130.

The remaining question is this: Is the petitioner under the admitted facts disqualified for the office of Mayor under the Acts of 1900, Chapter 15? It is admitted that Mr. McEvoy was appointed and qualified for a full term as one of the Police Commissioners of Baltimore City—his term beginning on the first day of May, 1914, and that he entered upon the discharge of the duties of the office and that he resigned the office of December 23, 1914, and on the following day tendered to the appellants his certificate of candidacy and the sum of one hundred dollars, as stated in the petition. The Act provides that: "Each of said Commissioners shall be appointed for two years, and their term of office shall commence on the first Monday of May next ensuing their appointment and shall hold office until their respective successors are appointed and qualified." The term for which Mr. McEvoy was appointed is accurately defined by the words of the Statute. The language employed is clear and explicit. It declares that the Police Commissioners shall be appointed for *two years*. It fixes the beginning of their terms, and declares that they "shall hold office until their respective successors are appointed and qualified." It is, therefore, clear that the term of office for which Mr. McEvoy was appointed was for two years at least, and was still

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further to continue until the happening of a distinct and definite event, viz: The appointment and qualification of his successor. After having thus fixed the duration of the term the Act declared that: "None of said Commissioners shall be eligible to an elective or appointed office *during the term for which he was appointed*, except under the militia laws of the State, or where the qualifications for such office are prescribed by the Constitution.

It is said in *Smith v. State*, 66 Md. 215, that: "Whatever latitude may, at one time, have been assumed by courts in the construction of statutes, the more recent cases have established the rule that when the language of a legislative enactment is clear and unambiguous, a meaning, different from that which the words plainly imply, cannot be judicially sanctioned. Even when a Court is convinced that the Legislature really meant and intended something not expressed by the phraseology of the Act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity. As was said by LORD DENMAN, in *Green v. Wood*, 7 Ad. & El. (N. S.), 185: "Those who used the words thought they had effected the purpose intended. But we, looking at the words as judges, are no more justified in introducing that meaning than we should be if we added any other provision. We can do no more than give such a meaning as the words authorize." The Supreme Court of Ohio, in *Woodbury v. Berry*, 18 Ohio, 462, emphatically say: "It is our legitimate function to interpret legislation, but not to supply its omissions." And the doctrine in all the States seems to be well established, and it is now uniformly held that if the language of a statute is plain and unambiguous there is no room for construction, there being nothing to construe. *United States v. Ragsdale*, 1 Hempstead, 497; *Bosley v. Mattingly*, 14 B. Mon. 89.

The term for which Mr. McEvoy was appointed was for two years. That term was not ended by his resignation. The admitted facts bring him within the disqualifying terms of the statute. The office of Mayor is an elective office,

and the petitioner is asking to become a candidate for the office of Mayor "during the term for which he was appointed" Police Commissioner. He is, therefore, ineligible for that office by the plain and unambiguous terms of the Act. It is earnestly insisted that the disqualification is limited to the *term of actual service*, but the statute does not so limit it. That construction would be a narrow one, and would fail to give any effect to the phrase "during the term for which he was appointed." If the Legislature had intended to limit the disqualification to the time of actual service or to the period of actual incumbency, it would have so stated and not have used language which extended the disqualifications to the entire period of the petitioner's appointment as Police Commissioner.

The reasons which induced the Legislature to impose this disqualification during the term need not be discussed. Some reasons, suggested from a consideration of the history of the police force of Baltimore City prior to the Acts of 1860, Chapter 7, and the subsequent legislation upon the subject, have been urged upon the Court, but the reasons or motives which actuated the Legislature in imposing the prohibition become immaterial in view of the plain provisions of the Act.

The high character and valuable public service of Mr. McEvoy, are conceded, but we are, for the reasons stated, constrained to hold that he is ineligible for election to the office of Mayor of Baltimore, and accordingly the order appealed from must be reversed.

Order reversed and petition dismissed, with costs to the appellants.

Md.]

Syllabus.

CHRISTOPHER SMITH

vs.

GEORGE SHUPPNER, SR., EXECUTOR.

Attorneys: duty of— Prayers: copied from other decided cases. Testamentary capacity: exclusion of near relatives; intrinsic evidence of will; presumption of capacity.

Witnesses: experts; opinions, foundation for—; attending physician. Evidence: once admitted; deductions from.

An attorney employed to assist in the settlement of an estate is presumably interested in keeping the estate from being the object of attack, and the fact that such an attorney calls the attention of a prospective litigant to the effect of litigation instituted by him adds nothing, in the way of discrediting that attorney, to his admission that he was so employed. p. 415

The fact that an instruction was taken from the language used in an opinion of the Court of Appeals in a former case, does not necessarily make the instruction correct in another case. p. 415

The fact that a testator disposes of his estate to the exclusion of near and dear relatives, without any known or apparent cause, while constituting a suspicious circumstance as to his capacity to make a proper disposition, does not *per se* furnish sufficient ground to set aside the will. p. 416

The intrinsic evidence furnished by the will itself is always an element to be considered by a jury in determining the sanity of a testator. p. 416

The presumption of law is that a testator was of sound mind at the time of the execution of his will, and the burden of proof is upon the caveator to prove the contrary. p. 417

A person defending a will is entitled to rely upon the presumption that a testator's reasons for excluding near relatives were valid and sane reasons. p. 417

In proceedings to determine a testator's testamentary capacity, it is the duty of the court, before permitting a witness, other than an attesting witness, or an attending physician testifying as an expert, to express an opinion as to the mental capacity of the testator, to require a statement of the facts and circumstances upon which such opinion was based. p. 417

In questions of mental capacity, a foundation must be laid for an opinion, and non-experts can not be permitted to give it, without giving the facts and circumstances upon which the opinion was based. p. 417

When evidence is once admitted, it is in the case to be considered, and the jury have the right to consider every fact that is proven to their satisfaction. p. 419

A prayer is correct that does no more than direct the jury's attention to the fact that what they are to determine is the condition of the testator's mind at the time of the execution of the will, and that if they are satisfied from the evidence that he was then capable of making a valid will, the fact that they may believe him to have become incompetent at a later period should have no effect. p. 419

Decided February 10th, 1915.

Appeal from the Court of Common Pleas of Baltimore City. (DOBLER, J.)

The facts are stated in the opinion of the Court.

Md.]

Prayers.

The following are the prayers of the caveatee, that the Court directed to be printed in the report of the case:

Deft.'s 7th Prayer—The defendant prays the Court to instruct the jury that it is not sufficient to avoid a will to show merely that a testatrix has left her estate to certain of her relatives and to strangers to her blood, to the exclusion of other of her relatives, without any apparently valid reason for so doing, as the testatrix may have had, what seemed to her at least, sufficient reasons which are not disclosed by the testimony. (*Granted.*)

Deft.'s 9th Prayer—That in passing upon the mental capacity of the testatrix, the jury should bear in mind that the mere opinions of witnesses are entitled to weight only to the extent that they are supported by good reasons founded on facts which warrant them in the opinion of the jury. If the reasons are frivolous or inconclusive, the opinions of such witnesses are of no value. (*Granted.*)

Deft.'s 10 Prayer—The Court instructs the jury that if they find from the evidence that the previously expressed intention of Regina Barbara Stoll as to the testamentary disposition of her property was different from that as expressed in the will in question, then this fact of itself will not be sufficient to overthrow said will, if the jury find from the evidence that Regina Barbara Stoll at the time of executing said will, had sufficient mental capacity to make a valid deed or contract. (*Granted.*)

Deft.'s 11th Prayer—The jury are instructed that if they find that on the date of the execution of the will of Regina Barbara Stoll, namely, on the 20th of March, 1910, the testatrix was of sound and disposing mind and capable of making a valid deed or contract, then they should disregard any evidence of impairment of her mental faculties after that time, if they find such. (*Granted.*)

The cause was argued before BOYD, C. J., BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

George A. Solter (with whom were *Wm. S. Bansemer* and *Adolph Schoneis* on the brief), for the appellant.

Karl A. M. Scholtz and *Robert F. Stanton*, for the appellee.

CONSTABLE, J., delivered the opinion of the Court.

This appeal involves the correctness of the rulings of the lower Court upon the trial of issues framed by the Orphans' Court of Baltimore City and sent to a law Court for determination, upon a caveat filed to the probate of the last will and testament of Regina Barbara Stoll. The issues were four in number: (1) Execution of the will; (2) testamentary capacity of the testatrix; (3) undue influence exercised upon the testatrix; (4) fraud practiced upon her. At the close of the caveator's testimony prayers were offered by the caveatee asking the Court to instruct the jury to find for the caveatee on each issue. The Court instructed the jury, as a matter of law, to find for the caveatee on the first, third and fourth issues, but refused to so instruct as to the second issue—testamentary capacity. The prayers granted were conceded by the caveator, so no question arises in this appeal from the ruling thereon. At the close of all the testimony, this rejected instruction was again asked and again refused; and the case being submitted to the jury on this one issue of testamentary capacity, the finding was in favor of the caveatee.

All of the prayers offered by the caveator were granted by the Court, so the exception to the prayers refer only to those granted on behalf of the caveatee. Of the eight exceptions to the testimony, the first and second have been abandoned, and we will consider the remaining in their numerical order. But first, we will give a synopsis of the facts, so far as we deem necessary, in order to determine the different questions here presented.

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Opinion of the Court.

The testatrix, at the time of her death, was the widow of John Stoll, who had predeceased her by about a month. They were an old German couple and had been engaged in the butchering and market business for many years in Baltimore City. They were childless, and left as their next of kin, nephews and nieces of each. The will in question was executed on the 20th day of March, 1910, when the testatrix was about eighty-two years of age. She died on the 19th day of August, 1913. John Stoll, the husband, who was a few years older, executed his will on the same day as his wife, and died on the 17th of July, 1913. Both had executed wills on the 31st of January, 1910, in which the disposition of their property was practically the same as in the wills of March 20th, 1910, with the exception of the residuary clause and the appointment of executors. Sometime after the execution of the prior wills, it was discovered that the party who had prepared them had, without authority, inserted his name as co-residuary legatee and executor. At first codicils were executed to correct this, but, finally, the wills were redrawn. Each will provided for a life estate for the surviving husband or wife. The husband distributed his estate, after the death of the surviving wife, among his and his wife's relatives and certain friends, with the residue to George Shuppner, Sr., naming him also as executor. The will of the wife, after the death of the husband surviving her, distributed a part of her estate by specific legacies and devises principally to the children of George and John Shuppner, close friends for years of both the husband and wife, and died intestate as to the residue of her estate, naming also George Shuppner, Sr., executor.

The only testimony as to testamentary capacity produced by the caveator, other than non-expert, was that given by Dr. Irving J. Spear, who based his opinion of the mental incapacity of the testatrix upon the facts recited in the testimony of the witnesses for the caveator, whom he had heard testify, he never having seen the testatrix.

The third exception was to the refusal of the Court to permit the following question to be answered: "What instructions did you give your father in regard to the new allotment of shares due to Mr. Stoll by virtue of his ownership of shares of stock in the Old Town Bank that stood in his name?" This question was asked George P. Shuppner, son of George Shuppner, executor of both wills. Young Shuppner had been left, under the will of John Stoll, after the life estate of Mrs. Stoll, some shares of bank stock. It is impossible to tell from the Record whether this question has reference to a point of time after the death of the life tenant or not. But assuming it referred to a time between the deaths of the Stolls, it is difficult to see on what ground it could be admissible. If Shuppner was claiming that the right to subscribe to the new allotment of stock belonged to him, as against the life tenant, that would not make it admissible under the only issue in this case. It could in no wise affect the question of the mental capacity of the testatrix; nor could his thought that he was entitled to it, in any manner, tend to discredit him.

The fourth, fifth, sixth and seventh exceptions all relate to questions asked George Shuppner, the executor and caveatee, under cross-examination, and can all be treated together, since they involve the same principle. Under the will of John Stoll, three ground rents had been left to three women friends of the Stolls by the name of Frederick. Three months before the death of Mr. Stoll, deeds had been executed conveying them to a third party, who in turn executed deeds conveying them to George Shuppner as trustee for Mr. and Mrs. Stoll. The title was in Mr. Stoll, and Mrs. Stoll joined in the deeds for the purpose of releasing her inchoate right of dower. From the testimony admitted, it is clear that this was a transaction of John Stoll about his own property; and to have gone further into the particulars than was gone, could have had no bearing upon the issue. The whole matter was irrelevant.

Md.]

Opinion of the Court.

The eighth exception also relates to the estate of John Stoll. Karl A. M. Scholtz was the attorney who drew the wills of March 20th, 1910, and was counsel for the executor in settling the estate of John Stoll. The caveator offered in evidence during the cross-examination of Mr. Scholtz, a letter written by him as attorney, to one of the beneficiaries of the will of John Stoll apprising her that the testator had conveyed before his death a lot of ground, which under his will, he had devised to her, but that by a codicil, she was bequeathed five hundred dollars in lieu thereof; and calling attention to the clause in the will about revoking devises as to anyone contesting the will. The caveator contends that since the testimony would show that the codicil was executed before the conveyance was made, the statement, that the legacy was in lieu of the devise which lapsed, was erroneous, and that the letter shows bias upon the part of Mr. Scholtz. The Court refused to admit the letter. This letter had to do entirely with the employment of the attorney in the settlement of an estate other than the one under controversy, and admitting there was error in the statement in the letter, we do not think it presented a proper subject for cross-examination in the trial over the will of Regina Stoll. Every attorney employed to assist in the settlement of an estate is presumably interested in keeping the estate from being the object of attack, and the fact that an attorney calls attention of a prospective litigant to the effect of litigation instituted by him, adds nothing, in the way of discrediting that attorney, to the admission that he is the attorney so employed. But this offer of proof, as we have said, was connected with another estate, and from its character, for the letter is in the record, we think the ruling was correct.

The Reporter will please set out the 7th, 9th, 10th and 11th prayers of the caveatee.

The 7th prayer was the 4th prayer of the caveatee in the *Berry Will Case*, 93 Md. 593, and although not commented upon in the opinion in that case, it is significant that upon

the reversal and remanding of that case, it was not criticized. The language is taken almost verbatim from the opinion of this Court in the case of *Crockett v. Davis*, 81 Md. 134. While this Court has many times said, that because an instruction was taken from the language used in an opinion in another case, that fact did not necessarily make the instruction correct (*Moore v. McDonald*, 68 Md. 321; *Stirling v. Stirling*, 64 Md. 138), yet in this case, we are of the opinion this prayer constituted a proper instruction. All through the decisions in this State, from *Davis v. Calvert*, 5 G. & J. 269, to *Lyon v. Townsend*, 124 Md. 163, it has been held that where a testator disposes of his estate to the exclusion of near and dear relatives, without any known or apparent cause, a suspicious circumstance as to his capacity to make a proper disposition is raised, but it does not *per se* furnish sufficient ground to set aside the will. The rule is founded upon reason, for one who is capable of making a valid deed and contract is capable of making a will, and if one has this qualification no matter how injudicious or imprudent the provisions standing alone may seem to a jury to be, the will should not be set aside. The intrinsic evidence furnished by the will itself is always an element to be considered by the jury in determining the sanity of a testator, and sometimes may furnish very important evidence tending to show the lack of that capacity. And when taken in connection with other facts may conclusively show incapacity. This prayer in our opinion in effect instructs that, conceding that the will itself, showing strangers to the blood of the testator were preferred to certain of her relatives, is a fact to be considered by the jury in determining her sanity, yet that fact standing alone is not sufficient to set aside the will. The appellant complains that the effect of the closing words of the prayer is to nullify all proof the appellant may have offered to show the provisions of the will, tended to prove the testator did not "know or recollect the relative claims of the different persons who should have been the objects of her bounty."

Md.]

Opinion of the Court.

The presumption of law is that a testator is of sound mind at the time of the execution of his will, and the burden of proof is upon the caveator to establish the contrary. *Brown v. Ward*, 53 Md. 376. A person defending a will, therefore, is entitled to rely upon the presumption that the reasons of the testator for excluding near relatives and others, who apparently should have been the objects of one's bounty, were valid and sane reasons.

The ninth prayer is the next to which objection is raised. This was the eighth prayer of the caveatee in *Etchinson v. Etchinson*, 53 Md. 348, and, although a conceded prayer in that case, was expressly approved in the opinion. The language was probably taken from the language used in the opinion in *Waters v. Waters*, 35 Md. 531, for it is verbatim. But independently of the authority of the approval of that case, we are of the opinion the prayer was a proper instruction. It is the duty of the Court before permitting a witness, other than an attesting witness, or an attending physician, testifying as an expert, to express an opinion as to the mental capacity of a testator, to require a statement of the facts and circumstances upon which such an opinion is based. *Townshend v. Townshend*, 7 G. 10; *Dorsey v. Warfield*, 7 Md. 65; *Waters v. Waters*, 35 Md. 531; *Williams v. Lee*, 47 Md. 321; *Kerby v. Kerby*, 57 Md. 345. In the last cited case, the Court said: "The rule is now well established, that a foundation must be laid for an opinion, and that non-experts cannot be permitted to give it without giving the facts and circumstances on which the opinion is based. *This is to enable the jury or tribunal on whom devolves the duty of decision to judge of the value of the opinion expressed, for if the opportunity of forming a judgment has not been good, the opinion will be of little or no value.*" It cannot be argued that every opinion will have an equal value, and this prayer properly instructed the jury as to the proper test to apply in order to arrive at a correct valuation. A reading of the testimony of the witnesses for the caveator compels us to the

conclusion that none of the opinions expressed were entitled to the denomination of knowledge, as distinguished by decisions of this Court in speaking of the impressions of persons in long, close and intimate relationship with a testator. *Weems v. Weems*, 19 Md. 334; *Williams v. Lee*, *supra*; *Berry Will Case*, *supra*.

To the tenth prayer there is no contention that it does not state a sound proposition, but it is urged that it is misleading in that it calls particular attention to a fact, amounting to a segregation of evidence. There can be no dispute as to the correctness of the rule prohibiting the use of isolated facts for the purpose of predicating special instructions thereon. The vice of this is especially illustrated in a case where the fact sought to be established is only to be arrived at by considering all of many facts in evidence; one or more may not satisfy a jury as to its existence, while all taken together might do so. Evidence of an intention to dispose of one's property at variance with that actually expressed in the will was admitted in this case for the purpose of throwing light upon the question of whether the testatrix was possessed, at the time of the execution of the will, of sufficient testamentary capacity, and for that alone. That this fact solely would not, in itself, be sufficient to determine the fact of incapacity is not open to argument, but, taken with other facts tending to prove incapacity, might have an important bearing. But we cannot agree that the prayer is subject to the objection, for it instructs the jury that if from a view of the evidence, which of course includes the evidence of the declarations of intention and the variance therefrom, they were of the opinion the testatrix was capable of making a valid will at the time of the execution, that then their verdict was not to be influenced by the fact she had not carried out her expressed intention. If it aimed to depreciate in any way the force that such evidence was entitled to or sought to isolate it from the body of the whole evidence, then there would be strength in the contention, but as we view it, it was merely a safeguard

Md.]

Opinion of the Court.

against any prejudice such evidence might create in the minds of the jury, by pointing out the only effect it could have in the determination of the issue.

The objection to the eleventh prayer is that it instructs the jury to disregard evidence that had been admitted. Of course, evidence when once admitted, is in the case to be considered; if it were not to be considered there would be no ground for admitting it; and the jury have the right to consider every fact that is proven to their satisfaction. *Moore v. McDonald*, 68 Md. 335. This evidence was admitted, like the evidence considered in the preceding prayer, for the purpose of shedding light upon the state of mind of the testatrix at the time of executing the will. *Davis v. Calvert*, 5 G. & J. 269. This prayer does no more than direct the jury's attention to the fact that what they are to determine, is the condition of the mind of the testatrix at the time of the execution of the will, and if they are satisfied from the evidence, that at that time she was capable of making a valid will, that then the fact that they may believe that she was at some time later incompetent, should have no effect. If it should be thought this prayer is misleading or confusing and the caveator was thereby injured, it is a complete answer that the jury was thoroughly and plainly instructed on this phase of the proof by the first prayer of the caveator.

The rulings of the lower Court will, therefore, be affirmed.

Rulings affirmed.

CARRIE L. LUCAS AND EDWARD D. LUCAS

vs.

JASPER WALTER LONG.

Specific performance; rules for—; misrepresentations; when a defense; fraud; must work actual injury.

Bad bargains: duty of purchaser.

Where a contract relating to real estate is in writing, and its nature and circumstances unobjectionable, it is as much a matter of course for a court of equity to decree its specific performance as it would be for a court of law to give damages for its breach. p. 427

In such a case, the fairness or hardship of a contract, like its other qualities also, must be judged as of the time it was entered into. p. 428

If it was then certain, mutual, fair in all its parts, and for an adequate consideration, it is immaterial that by force of subsequent circumstances it should have become less beneficial to one party, unless such change is in some way the fault of the party seeking its specific performance. p. 428

If the contract was reasonable and fair when entered into, it will be presumed the risk of subsequent fluctuations in value was assumed by the parties, and such fluctuations will not be allowed to prevent specific performance of the contract. p. 428

Misrepresentations as to the purpose for which it is proposed to purchase a piece of property, in order to be a ground for refusing to decree a specific performance of the contract, must not only be false, but they must have been material to the contract or transaction which is to be avoided, and must have worked actual injury to the defendant, or must have been the moving cause for entering into the contract of sale. p. 429

Md.]

Syllabus.

But a purchaser is not bound to make the party he buys from as wise as himself; and every man must bear the loss of a bad bargain legally and honestly made. p. 430

The fraud must work an actual injury to the party resisting the enforcement of the contract, and it must appear, not only that he did rely upon the false statement, but that he had the right to rely upon it, in the full belief of its truth. p. 429

A statement that a tract of land was being purchased for a dairy farm, when the tract was not cleared and was totally unfit for dairy farming, and where the owner knew and claimed that it was specially valuable for sub-division and development, can not be regarded as a material misrepresentation, sufficient to form the basis for a refusal to decree the specific performance of a contract of sale, where the purchase was really intended for such last mentioned purpose. p. 429

Decided April 7th, 1915.

Appeal from the Circuit Court for Montgomery County.
(In Equity.) (PETER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

William J. Lambert (with whom was *Charles W. Prettyman* on the brief), for the appellant.

Jackson H. Ralston (with whom were *Wm. E. Richardson* and *Harvey T. Winfield* on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This is a proceeding by a bill in equity to enforce the specific performance of a written contract for the sale of certain real estate containing 179 acres more or less, situate

in Montgomery County and belonging to Carrie L. Lucas, one of the defendants in the case.

It appears from the record, that on the 2nd day of September, 1911, the plaintiff and defendants executed the following written contract, called Agreement No. 1. It is set out in the record and is as follows:

“Washington, D. C., September 2d, 1911.

“Received of J. W. Long a deposit of two hundred dollars (\$200) to be applied as part payment in purchase of one hundred and seventy-nine (179) acres, two roods and sixteen perches of land, situated in Montgomery County, Maryland, being the same land conveyed to Carrie L. Lucas by Clarence D. and Olive P. Kefauver by deed dated December 7th, 1910, and recorded in Liber 216 and folio 374.

“The purchase price is to be ninety dollars (\$90) per acre. Deposit above stated two hundred (\$200) dollars, one thousand (\$1,000) dollars September 14, 1911; five thousand two hundred forty-one dollars (\$5,241) January 2d, 1912, and the purchasers agree to assume a mortgage of nine thousand six hundred and seventy-four dollars (\$9,674), with interest at the rate of six per cent., from September 14th, 1911.

“Property sold as a good title, subject to the above-mentioned mortgage, or deposit to be returned and sale declared off. Seller is to furnish abstract now in his possession.

“Taxes, interests, rents to be adjusted to date of transfer, except as above stated.

“Purchaser is required to make full settlement in accordance with the terms of sale as above stated, or the deposit will be forfeited.

“Seller to give the usual special warranty deed, conveying at purchaser's cost.

Carrie L. Lucas,
Edward D. Lucas,
Owners.

“Approved by J. W. Long, Purchaser.”

Md.]

Opinion of the Court.

Afterwards, on or about the 14th of September, 1911, a second contract was executed between the parties, the one here sought to be enforced, and this contract which is called the second agreement, was substituted by the parties for the first contract. It is signed by the parties and is as follows:

“Washington, D. C., September 2d, 1911.

“Received from J. W. Long, a deposit of two hundred dollars to be applied as part payment in purchase by him or his assigns of one hundred seventy-nine (179) acres, two rods and sixteen perches of land situated in Montgomery County, Maryland, being the same land conveyed to Carrie L. Lucas by Clarence D. and Olive P. Kefauver by deed dated December 7th, 1910, and recorded in Liber 216 and folio 374, among the land records of the above mentioned Montgomery County, Maryland.

“The purchase price is eighteen thousand two hundred and sixty dollars, payable on the following terms: Two hundred (\$200) cash in hand, receipt of which is hereby acknowledged, seven thousand and sixty-five dollars and seventy-eight cents (\$7,065.78) on or before January 2, 1912, and the purchaser or his assigns, agree to assume a mortgage now on the property and held by W. W. Anderson for the sum of Ten thousand six hundred and seventy-four dollars (\$10,674), with accrued interest to the amount of three hundred twenty dollars and twenty-two cents (\$320.22), due and payable September 5, 1911. Such assumption and taking over of the mortgage by the purchaser and liability thereon to date from September 14, 1911, prior to that date the seller is liable for all unpaid interest and other payments of whatsoever kind except as above mentioned.

“Property is hereby sold as of good title, subject to the above mentioned mortgage or the deposit of two hundred dollars (\$200) is to be returned to the purchaser or his assigns and the sale declared off. The seller is to furnish abstracts on the above mentioned property now in his possession.

"Taxes, interests, rents to be adjusted to date of transfer, except as above stated.

"The purchaser or his assigns is required to make full settlement in accordance with the terms and conditions of this contract and title deed to be made and delivered to him or his assigns on the payment of the above mentioned seven thousand and sixty-five dollars and seventy-eight cents (\$7,065.78), January 2nd, 1912, or the above mentioned deposit will be forfeited by him.

"Upon the payment to Mr. W. W. Anderson of one thousand dollars (\$1,000), due him on September 15, 1911, as a payment on the principal of the above-mentioned mortgage, it is hereby agreed and understood that said Anderson is to deliver to Carrie L. Lucas the cancelled note for said one thousand dollars (\$1,000), and Carrie L. Lucas is to deliver the same cancelled note to J. W. Long or his assigns, upon delivery of deed and the making of the payment of seven thousand and sixty-five dollars and seventy-eight cents on January 2nd, 1912.

"The seller is to give the usual special warranty deed, conveyance at cost of purchaser."

It also appears, that at the time of the execution of the second agreement, the defendants made and delivered to the plaintiff the following agreement:

"We hereby agree to pay R. E. L. Yellott and J. W. Long a commission of ten per cent. (10%) on eighteen thousand two hundred and sixty dollars (\$18,260), the price at which they have sold our property consisting of 179 acres in Montgomery County, Maryland. Commission to be paid on date of transfer. No commission to be paid unless the property is sold according to the terms of the contract entered into this day between J. W. Long and Carrie L. and Edward D. Lucas.

"Witness our hands and seals this 2d day of September, 1911.

.....(Seal)
.....(Seal)."

Md.]

Opinion of the Court.

The bill sets out in substance that the plaintiff has complied with the terms of the agreement and is ready, willing and able to pay the sum of money required by the contract to be paid, but the defendants refused and still refuse to execute a deed for the property in accordance with their contract.

By the fourth paragraph of the bill it is alleged that the plaintiff on the 14th of September, 1911, in accordance with the terms of the agreement obtained from Wm. W. Anderson, the one thousand dollar note mentioned therein and after the note was duly cancelled, delivered the same to the defendant, Edward D. Lucas, who was authorized and did receive and accept the same on behalf of himself and the defendant, Carrie L. Lucas.

It is further alleged by the bill that on the 2nd of January, 1912, the plaintiff tendered to the defendant the sum of money which under the terms of the agreement it was provided she was to be paid, on that day, and also tendered to her a deed to be signed by herself and husband, conveying the land to him, in accordance with the contract, but the defendant refused to accept the money or to execute the deed.

That by a letter dated the 2nd day of January, 1912, the attorney for the defendants, notified the plaintiff that the defendants did not recognize any liability under the agreement and refused to comply with the terms thereof.

The defendants in their answer to the bill, admit the execution of the contract, the payment of the deposit of two hundred dollars, in part payment of the purchase money and that the \$1,000 note was cancelled and delivered to them in accordance with the terms of the contract, but they deny the tender of the money as alleged and insist that the contract is not a valid and binding one, and that its enforcement by a Court of equity would operate as a fraud upon their rights.

The Court below, after hearing upon bill, answer and full proof, decreed that the contract be specifically performed and from this decree the defendants have appealed.

The special objections and grounds upon which the defendants by their answer resist the specific execution of the contract in this case are, first, that no legal tender of the money named in the contract was made on the second day of January, 1912. Second, that there was such fraud in the transaction as vitiates and avoids the contract. Third, that the execution of the contract was procured by fraud and misrepresentation and by illegal and improper concealment of facts known to the plaintiff while acting as the agent of the defendants, in the sale of the property, which information was withheld and concealed from them. Fourth, that the contract was entered into by reason of a misrepresentation on their part, which was induced by the misrepresentation of the plaintiff and one W. W. Anderson, as to the purpose for which the farm was desired; that the plaintiff and Anderson were acting as agents for the defendants, and were required to secure for them the best price possible, while in truth and in fact, they were acting for themselves and their associates and their whole effort to lower the price of the property was designed for the benefit and advantage of themselves and their associates in a company then about to be formed, and, Fifth, that by means of the pretended agency of the plaintiff and Anderson the defendants were induced to part with their property at a grossly inadequate price for the benefit of a syndicate of which they were members and in which they were concerned.

As to the first objection that no proper tender of payment of the money on the 2nd of January, 1912, was made the defendants as required by the contract little need be said.

Apart from the testimony of the witnesses Long and Dively that a sufficient tender was made, on the 2nd of January, 1912, and the leaving of a deed with Mrs. Lucas for the conveyance of the property to the purchaser, it appears from the record, that in November, 1911, the defendants had determined not to execute their contract with the plaintiff, and had returned the \$200 which had been paid to their attorney with instructions to their attorney that they would

Md.]

Opinion of the Court.

not carry out the contract, and the plaintiff was notified of their conclusion on the 3rd of January, 1911, by letter.

Secondly, was the contract price agreed to be paid for the property a reasonable and fair one or was the consideration so grossly inadequate, as to justify the defendants in now disregarding and repudiating the contract?

It appears from the record, that the property had been sold in 1910, by W. W. Anderson for \$65 per acre, the purchaser paying \$1,000 in cash and executing a mortgage for \$10,674.00 represented by one note of \$1,000.00 and another for \$9,674.00. The property was afterwards purchased from Anderson's vendee, by the defendants subject to this mortgage, and the proof shows that sometime in the early part of 1911, the defendants not being able to pay the accrued interest offered to deed the property back to the mortgagee, upon the payment to them of \$1,000. The property was subsequently sold to the plaintiff by the defendants after negotiations between them from May, 1911, to August, 1911, at the sum of \$90 per acre, according to the contract, set out herein.

There is no evidence in the record to sustain the contention that \$90 per acre was not a fair market value of the property when the contract for its sale was made by the parties.

In *Cochran v. Pascault*, 54 Md. 1, it is said, that where a contract relating to real estate, is in writing, and is in its nature and circumstances unobjectionable, it is as much a matter of course for a Court of equity to decree a specific performance of it, as it is for a Court of law to give damages for a breach of it; that the fairness or hardship of a contract, like all its other qualities, must be judged of at the time it was entered into; if it was then certain, mutual, fair in all its parts, and for an adequate consideration, it is immaterial that by force of subsequent circumstances it has become less beneficial to one party, unless such change is in some way the fault of the party seeking its specific execution. *Smoot v. Rea*, 19 Md. 405; *Brewer v. Herbert*, 30 Md. 301.

In *Marble Co. v. Repley*, 10 Wall. 357, it is said, It is by no means clear that a Court of equity will refuse to decree the specific performance of a contract, fair when it was made, but which has become a hard one by the force of subsequent circumstances.

In *Willard v. Tayloe*, 8 Wall. 571, the Supreme Court said, the question in such cases always is, was the contract, at the time it was made, a reasonable and fair one? If such were the fact, the parties are considered as having taken upon themselves the risk of subsequent fluctuations in the value of the property, and such fluctuations are not allowed to prevent the specific enforcement. *Frye on Specific Performance*, 252.

Third, the alleged fraud and deceit relied upon by the defendants to avoid the contract is based upon the theory that the plaintiff and Anderson were their agents, in procuring the sale, and the defendants were induced by false, fraudulent and deceitful representations made by both the plaintiff and Anderson to execute the contract.

The fraud and deceit is asserted to consist in two alleged facts; first, that the plaintiff and Anderson represented to the defendants that the purchase of the land was being made to be used as a dairy farm, and, second, the concealment of the fact that there was pending a development and improvement in the vicinity of the defendant's property, that would greatly enhance its value.

We concur in the conclusion reached by the learned judge who decided this case in the Court below that the proof fails to show that the plaintiff and W. W. Anderson, or either of them were the agents of the defendants, in the sense of occupying a confidential relation, in procuring and effecting the sale of the property, here in controversy; that the misrepresentations as to the purpose for which the property was desired, were immaterial, although false and did not work an actual injury to the defendants or was the moving cause for entering into the contract of sale.

Md.]

Opinion of the Court.

We find nothing in the facts as disclosed by the record, that would take this case out of the well settled rules of law, established by numerous decisions of this Court, and as applicable here.

In *McAleer v. Horsey*, 35 Md. 439, it is said, the fraud must be material to the contract or transaction which is to be avoided, for if it relate to another matter or to this only in a trivial and unimportant way, it affords no ground for the action of the Court. The fraud must work an actual injury to the party complaining, and it must appear that he not only did in fact rely upon the fraudulent statement, but had a right to rely upon it in the full belief of its truth, for otherwise it was his own folly or fault, and he cannot ask of the Court to relieve him from the consequences.

In *Byrd v. Rautman*, 85 Md. 414, it is said, the representation of the motive actuating a buyer cannot be more than a nude assertion, unless it incorporates some false averment of a fact on which the other party relies and ought to rely, and without which the contract, it is reasonable to infer, would not have been made, or suppresses some fact, the knowledge of which it is reasonable to infer would have made the party abstain from the contract altogether.

In 14 *A. & E. Ency. of Law* (2nd Ed.) 66, it is stated and supported by authority. If, however, a misrepresentation is so trivial, that it could not have influenced the conduct of the other party, it is to be regarded as immaterial, and does not amount to fraud though false and known to be false by the party making it.

As stated by the Court below in its opinion, the misrepresentation of the purpose for which the property was wanted had no influence whatever upon the minds of the defendants. The property was not equipped as a dairy farm; in fact, it would seem from the testimony that it was uncleared. The defendants not only knew that the property in its then condition could not be used as a dairy farm, but Mr. Lucas believed it had a value for the purpose for which it was in fact purchased by the plaintiff, for on May 5th, 1911, he wrote

Mr. Anderson: "We will consider offers for purchase, and with my experience in constructing and selling properties I believe a stock company would produce good results to purchasers of stock from treasury for developing the property under my direction, and I would be glad to negotiate with investors." This letter was written the day after the day on which Mr. and Mrs. Lucas have testified that Mr. Anderson first told them the property was wanted for a dairy farm.

In *Burt v. Mason*, 97 Mich. 127, the Court said, Mason made no false or fraudulent assertion of existing facts. Neither did he conceal any material facts which he was under a legal or equitable duty to communicate to Mr. Burt. No legal or moral obligation rested upon him to inform Mr. Burt that there was talk or were prospects of a railroad coming to this point, nor that he was making efforts to induce the building of one."

In *Harris v. Tyson*, 24 Pa. St. 347, the Court held, that the ignorance of the vendor is not of itself fraud on the part of the purchaser. A purchaser is not bound by our laws to make the man he buys from as wise as himself. * * * Every man must bear the loss of a bad bargain legally and honestly made. If not, he could not enjoy in safety the fruits of a good one.

It follows from what we have said that in our judgment the decree of the Court below was correct, and the same will be affirmed.

Decree affirmed, with costs.

Md. |

Syllabus.

LOUIS BAMBERGER AND ABRAM G. HUTZLER,
EXECUTORS OF THE ESTATE OF ELKAN
BAMBERGER, DECEASED,

vs.

THE MAYOR & CITY COUNCIL OF BALTIMORE.

SAME vs. STATE OF MARYLAND.

Taxes: after settlement and distribution of estate; executors' liability.

Under the statutes in force in Maryland, the liability of administrators and executors for the payment of taxes upon the property of their decedent, does not extend to the payment of taxes becoming due after the settlement and distribution of the estate, although the annual valuation and assessment of such property, as well as the levy thereon, may have been made prior to such settlement and distribution of the estate. p. 443

Decided April 7th, 1915.

Two appeals in one record from the Baltimore City Court.
(SOPER, C. J.)

The causes were argued together before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Charles Markell (with *Gans and Haman* on the brief), for the appellants.

Edward J. Colgan, Jr., Assistant City Solicitor (with whom was *S. S. Field, the City Solicitor*, on the brief), for the appellees.

PATTISON, J., delivered the opinion of the Court.

The Mayor and City Council of Baltimore brought suit against the appellants as executors of Elkan Bamberger, deceased, to recover city taxes for the year 1910 upon the estate of the decedent. The estate consisted of furniture and household effects and of "bonds, certificates of indebtedness and evidences of debt." On the first day of October, 1909, the furniture was valued and assessed, for the purpose of taxation for the year 1910, at the sum of \$600, and the bonds, etc., were at such time and for said purpose assessed at the sum of \$258,756. After such valuation and assessment and after the passage of an ordinance on the 23rd day of December, 1909, making the annual levy of taxes, but before the taxes became due and payable on January 1, 1910, the appellants, under an order of the Orphans' Court of Baltimore City passed on the 29th day of December, 1909, distributed the estate of their decedent without paying therefrom the aforesaid taxes for the year 1910.

It was to recover these taxes that the suit in this case was brought, and the only question presented by this appeal is, whether the appellants as such executors are liable for the payment of said taxes.

It is not because of any beneficial ownership in the estate of their decedent that administrators and executors are chargeable with the payment of taxes thereon, but it is a statutory liability imposed upon them as custodians and holders, in their representative capacity, of a qualified title in the estate, pending its settlement, and consequently we must look to the statute to find their liability as well as the extent of such liability.

Md.]

Opinion of the Court.

Section 70 of Article 81 of the Code of 1912 provides that "Administrators shall pay all taxes *due* from their decedent as preferred debts, and to the exclusion of all others, except the necessary funeral expenses; and on failure, their bonds shall be put in suit for the use of the State, and recovery had for the whole amount of taxes *due*, and interest from the time they were payable"; and section 11 of said Article provides that "The several registers of wills in this State shall annually, on or before the first day of March, return to the county commissioners or appeal tax court, a summary account of all property that shall appear by the records of the several orphans' courts to be in the hands of such executor, administrator or guardian as such; and all such property, if not before assessed, shall then be assessed; and every executor, administrator or guardian shall be liable to pay the taxes levied thereon and shall be allowed therefor by the orphans' courts in their accounts."

In our opinion, the above provisions of the Code, when construed together, confine the liability of administrators and executors to the payment of those taxes *due* from the decedent at the time of his death and to such other taxes as may thereafter become *due* while the estate is in the course of settlement and before it is distributed, including, of course, the taxes upon assessable property that was not at the time of decedent's death assessed, but which was thereafter, under said section 11, assessed and brought within the operation of levies previously made.

The correctness of this conclusion is shown by the decisions of this Court in *Wheeler v. Addison*, 54 Md. 41, and *State v. Safe Deposit & Trust Co.*, 86 Md. 581. In the first of these cases the Court was construing section 63 of Chapter 483 of the Acts of 1874, which is now section 68 of Article 81 of the Code, with the sole amendment that from the proceeds of the sale only the taxes upon the property sold shall be paid. This Court in that case said: "The sale was made September 14, 1877, and the taxes were not then

due and in arrear for the year 1877. Section 63 of the Acts of 1874, Chapter 483, reads thus: 'Whenever a sale of either real or personal property shall be made by any ministerial officer, under judicial process or otherwise, all sums *due and in arrears* for taxes from the party whose property is to be sold, shall be first paid and satisfied, and the officer or person selling shall pay the same to the collector of the county or city, if any, or to the treasurer if there be no collector. And the 66th section of the same Article declares that taxes shall be considered in arrears on the first day of January next succeeding the date of their levy, and shall bear interest from that date at the rate of six per cent. per annum.' According to the express language of the statute, taxes are not to be regarded in arrears until the first day of January after the levy made. These taxes are expressly named as being for 1877. They were therefore not in arrears until the first of January, 1878, and by the terms of the law the trustee was not bound to pay them."

In the case of *State v. Safe Deposit & Trust Company*, *supra*, the main question there presented was when did the State taxes assessed upon the stock of the corporation become due. The determination of that question was necessary in order to determine whether the trustee, who had sold some of the stock of the corporation on the 23rd day of May, 1895, was chargeable with the taxes for that year. This Court held in that case that the taxes were not due and in arrears, under section 84 of Article 81 of the Code of 1888, as modified by the Acts of 1890, Chapter 244, until the first day of November, and consequently such taxes were not due and in arrears when the property was sold on May 23rd of that year.

The Court having decided when the taxes became due and in arrears, it then became necessary, in order to determine whether such taxes were properly chargeable against the trustee, for the Court to construe section 64A of Chapter 407 of the Acts of 1896, now section 69 of Article 81 of the Code of 1912, which provides that "Whenever a sale of

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either real or personal property of a corporation, on which State taxes are due and payable, shall be made by any sheriff, constable, trustee, or other ministerial officer, under judicial process or otherwise, all sums *due* and *in arrears* for State taxes from the corporation whose property is sold, shall be first paid and satisfied after the necessary expenses incident to the sale." And the Court there said: "As the sale of the property (the stock of the corporation) took place on the 23rd day of May, 1895, there were no taxes for that year due and payable at the time of this sale properly chargeable against the trustee, the appellee in this case. The statute provides only for the payment of such taxes as may be *due* and *in arrears* at the time of the sale of the property."

This Court again construed section 68 of Article 81 in the *Casualty Ins. Co.'s case*, 82 Md. 565, in which it said: "These taxes were consequently due when the company's assets passed into the hands of the receiver, and being *then due*, the Act of 1892, Chapter 518 (now section 68 of Article 81 of the Code of 1912), directs that they shall be paid and satisfied by the officer or person selling under judicial process the property, real or personal, upon which such taxes are payable."

But it is contended by the appellees that the liability of administrators and executors in respect to the payment of taxes upon the estate of their decedent has been extended and enlarged by certain provisions of the city charter found in sections 36, 40, 168 and 171 (Acts 1898, Ch. 123).

Section 36 creates the Board of Estimates and provides that such board shall annually, between the first day of October and the first day of November, cause to be prepared a draft of an ordinance to be submitted to the City Council providing appropriations sufficient to meet all expenditures of the city government for the ensuing year, which ordinance when passed is designated therein as the ordinance of estimates.

Section 40 provides:

"The Board of Estimates shall, on the first day of October, or as soon thereafter as practicable, in the year 1898, and in each succeeding year, procure from the proper municipal departments and shall send with said ordinance of estimates to both branches of the City Council a report showing the taxable basis for the next ensuing fiscal year and the amount which can reasonably be expected to be realized by taxation for said year. The report shall show the difference between the anticipated expenditures and receipts of the city and shall state a rate for the levy of taxes sufficient to raise the amount required to meet the said difference." The section then provides for the passage of an "ordinance making the annual levy of taxes, which ordinance shall be passed by the Mayor and City Council of Baltimore in the month of November in each year, and as soon as practicable after the passage of the ordinance of estimates, the Mayor and City Council of Baltimore shall fix a rate of taxation not less than the rate stated in the aforesaid report. * * * The taxes levied under said ordinance * * * shall be the taxes to be collected for the fiscal year next ensuing after said month of November and may be paid to the city collector on or after the first day of January next ensuing said levy. The taxes included in said levy on * * * all forms of personal property shall be in arrears on the first day of May next ensuing the date of their levy," and shall bear interest from such time.

Section 168 is a re-enactment of said section 11 of Article 81 of the Code of 1912, with the single amendment that the return therein mentioned to be made by the register of wills is to be made on or before the first day of October instead of on or before the first day of March, as provided in said section 11 of the Code.

Section 171 of the charter provides:

"In the year 1898, and in all succeeding years thereafter, the valuation of the property subject to taxation

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in the City of Baltimore, as it shall appear upon the assessment books of said court on the first day of October in each and every year, shall be final and conclusive and constitute the basis upon which the taxes for the next ensuing fiscal year shall be assessed and levied; provided, the foregoing provisions shall not apply to property in the city liable to taxation and which may have escaped or which may have been omitted in the regular course of valuation, but such property shall be valued and assessed and the owners thereof charged with all back and current taxes justly due thereon whenever the same may be discovered and placed upon the assessment books."

It is upon the provision found in section 171, "that the valuation of property subject to taxation in the City of Baltimore as it shall appear upon the assessment books of said Court on the first day of October in each and every year, shall be final and conclusive and constitute the basis upon which the taxes for the next ensuing year shall be assessed and levied," considered in connection with the aforesaid sections 36, 40 and 168 of the Charter, that the appellees chiefly rely in their contention that upon and after the aforesaid valuation and assessment of the decedent's estate the appellants, as his executors, became liable for the payment of the taxes thereon for the ensuing year, even though the estate was distributed by them, under the order of the Orphans' Court, before said taxes became due.

This provision of the present charter appears, in practically the same language, in the City Codes of 1879, 1892 and 1893, the only difference being, as shown by the preceding codes, that the assessment and valuation was to be made upon the first Monday of March and not upon the first day of October, as provided by the present charter.

In the case of *Hopkins v. Van Wyck*, 80 Md. 7, which was decided November 14, 1894, this provision of the charter was before the Court. In that case property which was in

existence and assessable on the first Monday of March, 1892, escaped valuation and assessment and was not at such time entered upon the assessment books. It was thereafter, on May 12, pursuant to section 9, now section 11 of Article 81, placed upon the assessment books of that year. The executors, however, resisted the payment of the taxes upon the ground that their testatrix had not been charged with this property on the assessment books on the first Monday of March, 1892. The same contention was there made that is made here, that such assessment and valuation was *conclusive* and that no property not included within such assessment and valuation could be made to come within the operation of the levy of that year, and this view was adopted by the lower Court, but upon appeal to this Court JUDGE MCSHERRY, speaking for the Court, said: "In the system thus devised to put into effective operation the fundamental law, it is obvious that, to avoid confusion and uncertainty, some definite period had to be adopted as the point of time, in each year, when the *valuation or appraisement* fixed upon the property actually assessed and charged upon the books to each individual, would no longer be open to question, but would be conclusively ascertained and made binding upon both the city and the taxpayer alike. Accordingly, the Mayor and City Council, by section 5 of Article 50 of the City Code of 1892, provided that 'the valuation of property as it shall appear by the assessors' books upon the first Monday of March, shall be final and conclusive and constitute the basis upon which the taxes for the ensuing year shall be assessed and levied.' But it was never designed by this provision to exempt from taxation for a current year the individual who, by adroitness or otherwise, succeeded in eluding the vigilance of the assessors, or who, by inadvertence, was not rated with all his assessable property on the first Monday of March of that particular year. Its only object is to fix for a current year a final and conclusive valuation upon such property of each taxpayer as is, on the first Monday in March, actually entered upon the assessment books; and

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not to exempt property that is not, but ought rightfully to be there. *It has relation to ascertain values and not to an exclusive basis.*"

The aforesaid sections 68 and 69 of Article 81, in addition to the one here involved (section 70), would seem to make it impossible to regard the valuation and assessment made on October 1st of any year as absolutely conclusive and final as to the property and amount of property subject to taxation for the ensuing year. Under these sections of the Code the amount of property so valued and assessed was liable to be diminished by the sale of any part of it. And, said section 171 of the charter, containing the provision that such valuation and assessment "shall be final and conclusive and constitute the basis upon which the taxes for the next ensuing fiscal year shall be assessed and levied," especially provides that such "provision shall not apply to property in the City liable to taxation and which may have escaped or which may have been omitted in the regular course of valuation, but such property shall be valued and assessed and the owner thereof charged with all back and current taxes justly due thereon whenever the same may be discovered and placed upon the assessment books." By this provision of the section the amount of property embraced within the annual valuation and assessment was liable to be increased by the addition of after discovered property. And therefore it will be seen by the existing laws that the property and amount of property embraced within the general valuation and assessment cannot be regarded as final and conclusive as the exact basis of taxation.

It is not contended by the appellees that by the aforesaid sections of the City Charter, the taxes are made to become due and payable *earlier* than the first day of January in the year succeeding the assessment and valuation. But the contention is made by them that to effectuate the objects and purposes of sections 36 and 40 of the City Charter, relating to the annual budget, the above quoted language of section 171 should be given a broader and more comprehensive

meaning than was given to it in the case of *Hopkins v. Van Wyck, supra*. The claim is made that to comply with the provisions of said sections it is essential that the Board of Estimates should know, at the time of making its estimate as to the needs and resources of the city and before the levy is made, the property and amount of property subject to taxation for the ensuing year, and it is for such reason, as we understand the contention of the appellee, that the claim is made that administrators and executors are to be held liable for the payment of taxes upon property of their decedent, valued and assessed on or before the first of October in any year, for the ensuing year, although the estate may be fully closed and the property distributed before the taxes for such ensuing year become due and payable.

In complying with the provisions of the Charter it is, of course, well to know so far as it is practicable to ascertain, at the time the levy is made and the rate fixed and established, what property is subject to taxation for the ensuing year and the value of such property; and this was true under the Charter of the City at the time the case of *Hopkins v. Van Wyck* was decided. It may be that under the present Charter this information is still more important in order that its provisions may be more readily and satisfactorily complied with, but for such reasons we do not feel called upon to modify the recognized meaning heretofore given to this language of the charter, or to modify the usual and ordinary meaning to be given to the language of the statute imposing liability upon administrators and executors for the payment of the taxes of their decedent, in the absence of any legislative enactment thereon.

The liability of administrators and executors for the payment of taxes upon property of their decedent, does not, we think, extend to the payment of taxes becoming due after the settlement and distribution of the estate, although the annual valuation and assessment upon such property, as well as the levy thereon, may have been made prior to such settlement and distribution of the estate, as in this case.

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The appellees in their brief quote largely from the case of *Union Trust Company v. State*, 116 Md. 368, and rely largely upon this as well as the case of *Baltimore City v. Chester S. S. Co.*, 103 Md. 400.

In the first of these cases the Court was construing section 150 of Article 81 of the Code of 1904, now section 153 of the Code of 1912. That section provides that the president or other officer of any corporation located and doing business in this State, shall, by the 15th of March in each year, report to the State Tax Commissioner a true and correct statement of the number of shares of the capital stock of such corporation and the par value of each share, with such information in regard to the value of the same as may be required by the Commissioner, and may be in the possession of such officer as of the first day of January in each year. The Commissioner is then required to value and assess said shares of stock as of the first of January next preceding. The section then provides that it "shall be the duty of the said president, cashier or other chief officer, on or before the first day of January next succeeding, to pay to the treasurer of the State, the State tax on said shares of the capital stock of such bank or banking association or other incorporated institution of which he is president, cashier or other chief officer as aforesaid."

In that case the treasurer of the company, on January 11th, filed with the State Tax Commissioner the report required to be made by the aforesaid section of the Code, and on January 22nd of the same year the Tax Commissioner placed a valuation upon said stock and a levy was made thereon. On February 25th, 1907, the Union Trust Company reduced its outstanding stock from twenty thousand to ten thousand shares and paid off, liquidated and retired ten thousand shares, and on the 16th of April, 1906, notified the Tax Commissioner of such reduction in its capital stock. The corporation resisted the payment of the taxes upon the entire twenty thousand shares of its stock, claiming that it

should pay taxes for such year only upon the remaining ten thousand shares.

We, in that case, on construing the aforesaid section of the Code, held the corporation liable for the payment of taxes upon the entire twenty thousand shares of its stock.

We are, however, unable to discover any similarity between that case and the case now before us. The liability of the corporation was dependent upon the statute, as the liability of the executors and administrators is dependent upon statute. The provisions of the statute creating the liability in respect to the corporation in that case differs altogether from the provisions of the statute creating the liability in respect to the executors in this case.

The officer of the company in that case was required to send to the Tax Commissioner his report showing the number of shares and the value of such shares on the preceding first day of January, which he did; and the Commissioner, upon the receipt of such report, was required to value and assess such stock, which he did; and the levy being made, the corporation was specifically required "on or before the first day of January next succeeding to pay to the treasurer of the State the State tax upon such shares of the capital stock." The liability of the corporation was in no sense dependent upon the question as to whether the taxes were due, but it was directed, in language which admits of no uncertainty, to pay the taxes levied upon the stock so returned by it as of the first day of the preceding January on or before the succeeding first day of January. The Court there said: "The Trust Company knew on February 25th that it had made a return to the State Tax Commissioner of twenty thousand shares of stock; it further knew that this stock was subject to taxation, and that the company was the agent of the State for collecting that tax; it was, therefore, its plain duty when it paid off the stockholders and retired ten thousand shares, to have retained from each one a sufficient amount to have paid the tax, and it cannot now set up its own voluntary act of the payment out of the money, as a

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ground to defeat a suit upon the part of the State, brought in accordance with the statute and based upon the sworn return of the corporation."

The same section of the Code was before this Court in the case of *Baltimore City v. Chester S. S. Co., supra*, and we find nothing in the opinion in that case inconsistent with the conclusion we have here reached.

In this case a plea was filed setting up the defense that the executors were not liable for the payment of the aforesaid taxes for the year 1910, in as much as the estate was finally settled and the property distributed before such taxes became due and payable, and that the Appeal Tax Court was duly notified in writing that the estate had been fully administered and the assets distributed, and that the defendants denied all liability for the payment of such taxes. To this plea a demurrer was interposed, which was sustained by the Court below, whereupon the case was submitted to the Court for trial on the issues joined on the remaining pleas, first, that they never promised as alleged, and, second, that they were never indebted as alleged, and a verdict was rendered by the Court in favor of the plaintiff, upon which a judgment was rendered.

From what we have said, we think the Court was wrong in sustaining the demurrer to the defendant's plea. We must, therefore, reverse the judgment of the Court below, and in as much as it was admitted at the trial, which admission is found in the record, that the distribution of the securities and property shown in the final account of the executors was in fact made to the parties therein named on or before the date of said account, to wit: December 29, 1909, and before the said taxes for the ensuing year became due and payable, it will serve no useful purpose to award a new trial in this case. Therefore, the case will be reversed without new trial.

*Judgment reversed, without new trial,
with costs to the appellant.*

O. F. HERMAN M. KOEHLER AND
MATILDA KOEHLER,

vs.

STATE ROADS COMMISSION OF MARYLAND.

*Statutes: construction; repeals by implication not favored.
Condemnation Law of 1914: no application to
condemnation for highways.*

If two Acts can be fairly construed together, the later Act can not be held to repeal the former Act by implication. p. 449

The Acts of 1912 (Chapter 177) and 1914 (Chapter 463), repealing and amending the Condemnation Laws of the State, especially exempt from their operation the law relating to the opening, closing or widening of highways. p. 448

Decided April 7th, 1915.

Appeal from the Circuit Court for Baltimore County.
(BURKE, C. J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, PATTISON, UERNER, STOCKBRIDGE, and CONSTABLE, JJ.

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Osborne I. Yellott and *J. LeRoy Hopkins*, for the appellants.

T. Scott Offutt (with whom was *Leon E. Greenbaum* on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

These proceedings were instituted on the 25th day of August, 1914, by the State Roads Commission of Maryland for the condemnation of a small strip of land containing two and forty-four one hundredths (2.44) acres situate near the Belair Road, in Baltimore County, and owned by the defendants.

This strip of land was found to be necessary for the construction of a State road in Baltimore County which was being built from a point on the Belair Road at the village of Perry Hall to a point on the road at Kingsville, in Baltimore County, and which was then in progress of construction.

The application and condemnation proceedings were instituted under the provisions of Chapter 141 of the Acts of 1908, section 32B, page 247, providing for the establishment of a system of public roads and highways in Maryland, and for the appointment of a commission to be known as the State Roads Commission, with full powers to construct, improve and maintain public roads and highways in the several counties of the State, and also providing the ways and means for their construction, improvement and maintenance.

Section 32B of this Act specially provides that the Roads Commission may "adopt and employ such means, methods or system of road construction, improvement and development as may, in its judgment, be best calculated to promote the objects of this Act; condemn, lay out, open, establish, construct, extend, widen, straighten, grade and improve, in any manner, any main road, of the system, in any county of this State and establish or fix the width thereof; cause to be

prepared such surveys, plans, drawings or maps as it may deem proper in the course of its work; acquire for the State of Maryland, by agreement, gift, grant, purchase or condemnation proceedings as prescribed by section 251 to 256 inclusive, or by section 360 to 366 inclusive of Article 23 of the Code of 1904 of the Public General Laws, any private road or roads whatsoever, or private property or rights of drainage for public use, whether belonging to private individuals or to turnpike companies or other corporations, and including any avenues, roads, lanes or thoroughfares, rights or interests, franchises, privileges or easements, that may be, in its judgment, desirable or necessary to complete said system of roads or to carry out the purposes of this Act."

Upon the return of the sheriff of the inquisition of the sheriff's jury, condemning the property in question and assessing the damages to the owners of the property at the sum of \$125, the defendants filed certain exceptions.

The objections presented by the exceptions were overruled by the Court below, and from an order finally ratifying and confirming the award of the jury this appeal has been taken.

The appellants contend that the proceedings in this case are null and void, because the Act of 1908, Chapter 141, known as the State Roads Act, in so far as it conferred power upon the State Roads Commissioners to condemn land and the procedure of condemnation there provided, had been repealed by Chapter 117 of the Acts of 1912 (p. 236) and by Chapter 463 of the Acts of 1914, before the institution of the proceedings in the case.

It is conceded by the appellants in their brief, that prior to the Acts of 1912, Chapter 117 (known as the New Condemnation Law of the State), the State Roads Commission could acquire property for State road purposes in any of the different ways and modes, as provided by the Code of Public General Laws of the State and the several Acts herein referred to. *Code*, Art. 23, secs. 269-274-399-405; *Code*,

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Art. 91, secs. 33-82, sub-title "Public Roads"; Acts of 1908, Chapter 141; Acts of 1910, Chapter 501 (p. 311).

It will be seen, then, that the decision of the case turns solely upon the question whether the Act of 1912, Chapter 117, or the Act of 1914, Chapter 463, repeals the Act of 1908, Chapter 141, regulating the procedure in the condemnation of property by the State Roads Commission for State road purposes, and this will depend upon a consideration of the Acts that have given rise to this controversy.

The Act of 1912, Chapter 117, the one relied upon as a repeal of the former Acts, is entitled "An Act to add a new Article to the Code of Public General Laws of 1904, to be known as Article 33A, 'Eminent Domain—regulating the procedure for the acquisition of property for public use by condemnation,' and also providing that the proceedings therefor shall be before a jury in Court instead of before a sheriff's jury," and to read, as provided by the Act.

It is clear that the object of the Act of 1912 was to provide condemnation proceedings before a jury in Court instead of before a sheriff's jury, in all cases, except those otherwise stated by the Act itself. This is made plain and manifest not only by the title of the Act, but by section 7 of the Act, which is as follows: "The State, and any municipal or other corporation, commission, board, body or person, which under the laws of this State, has the right to acquire property by condemnation, shall acquire such property, if condemnation proceedings be resorted to, in pursuance of, and under the provisions of, this Article, anything in any other Public General Law or Public Local Law or private or special statute to the contrary notwithstanding; provided, however, that nothing in this Article contained shall apply to or change the present law or procedure for the opening, closing, widening or straightening of highways."

The proviso in the seventh section above cited specially provides that nothing in the Article should apply or change the present law or procedure for the opening, closing, widen-

ing or straightening of highways. It is difficult to understand how any serious contention can be made, in view of this proviso, that the law and procedure, then in force (Acts of 1908, Chapter 141, and Acts of 1910, Chap. 501), relating to highways, were in any way intended to be repealed or to be affected by the Act which excepted them from its operation. The Acts of 1908 and 1910 both provide the method and manner of acquiring property by condemnation for road purposes, necessary to complete a general system of improved State roads, and section 32B of the Acts of 1908, specially provided the procedure by which land could be acquired by the State for these roads.

The Act of 1910, Chapter 501, did not repeal the procedure prescribed to acquire land by condemnation given the State Roads Commission by the Act of 1908, Chapter 117, but was passed, as its title declares, to supplement the powers conferred by the previous Act, and also "for the purpose of supplementing the powers of condemnation now conferred upon the Commission."

The Act of 1912, Chapter 117, was subsequently repealed and re-enacted, with amendments by Chapter 463 of the Acts of 1914, and the identical proviso "that nothing in this Article contained shall apply to or change the present law or procedure for the opening, closing or widening of highways, was retained and is contained in sub-section 15 of section 1 of that Act.

The powers given and conferred by the Legislature upon the State Roads Commission by the Acts of 1908 and 1910, manifestly relate to the "procedure" provided for the purpose of opening, closing, widening and straightening highways, and this being so, the procedure provided by those Acts, was not only not repealed by the Acts of 1912 and 1914, but was by the provisos contained in them expressly excepted from their operation.

In the recent case of *Pitsnogle v. W. Md. Ry Co.*, 123 Md. 670, we said, that Chapter 117 of the Acts of 1912, did

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not in terms repeal any of the prior legislation upon condemnation except wherein the same may be inconsistent with the provisions of that Act. *Ridgely v. Baltimore City*, 119 Md. 567; *Pitsnogle v. W. Md. R. R. Co.*, 119 Md. 673.

In the present case, it is conceded there is no express repeal in terms of the prior legislation, but it is urged that the provision in section 7 of the Acts of 1910 and 1914, to the effect that "The State, and any municipal or other corporation, * * * shall acquire such property, * * * under this article," works a direct repeal by way of implication, and that it was the intention of the Legislature that all condemnation proceedings, road opening and all others, should be before a jury in Court instead of before a sheriff's jury. The plain answer to this contention is to be found in the provisos to the sections of the Acts herein set out, wherein it is distinctly provided that nothing in the Article shall apply to or change the present law or procedure, for opening, closing or widening highways.

Besides this, there is no such inconsistency between the provisions of these Acts, as to permit the application of the doctrine of repeal by implication.

It is well settled that if the two Acts can by a fair and reasonable construction stand together, there is no ground on which it can be held that the later Act operates as a repeal of the former Act.

It follows that as the Court below had jurisdiction of the subject-matter and there being no appeal to this Court, the appeal must be dismissed.

Appeal dismissed, with costs.

JOHN COWAN, INCORPORATED,

vs.

WILLIAM MEYER.

*Contracts: construction; bad bargains. Liquidated damages:
impossibility; difficulties not guarded against;
city ordinances.*

Where the parties to a contract, at or before the time of the execution of the same, agree upon and name a sum therein to be paid as liquidated damages in lieu of anticipated damages which are in their nature uncertain and incapable of exact ascertainment, the amount so named will be regarded as liquidated damages and not as a penalty, unless such amount be grossly excessive and out of all proportion to the damages that might reasonably have been expected to result from such breach of the contract. p. 463

Whether the amount is excessive or whether the damages are incapable of exact ascertainment, is to be determined from the subject-matter, considered in the light of all the surrounding circumstances connected therewith and known to the parties at the time of the execution of the contract. p. 463

A building and contracting company contracted to build a large terminal warehouse for a subsidiary company of the

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Syllabus.

Western Maryland Railway. In the contract there was provided that there should be paid by the contractor, as liquidated damages, the sum of \$95.00 for every day's delay beyond the time limited for the completion of the work; a sub-contractor, knowing all the terms of the original contract, contracted with the building company for the digging of the foundations; there was in his contract the same provision for the payment of the same sum *per diem* as liquidated damages, for failure of the sub-contractor to complete the work within the specified time: *Held*, that in view of all the facts, the sum named was not excessive, and that the sum named should be treated as "liquidated damages" for the breach. pp. 464-465

The effect of such a contract is to substitute the amount agreed upon as liquidated damages for the *actual* damages resulting from the breach; and the party who fails to perform such a contract will not be heard to say that the other party has not suffered any damages from the breach, or that his loss was less. p. 465

In such a case the party committing the breach can not allege unforeseen difficulties as an excuse for his breach. p. 466

The rights of parties to a contract must be determined by the terms of the agreement they have voluntarily made. Courts can not make a different contract for them, or relieve them of the consequences of a bad bargain. pp. 466-467

A party who, by his contract, charges himself with an obligation possible to be performed, must make it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him. p. 467

The fact that city ordinances limited the time during which explosives for blasting could be used was held not to excuse his breach of contract. p. 467

Decided April 7th, 1915.

Appeal from the Court of Common Pleas of Baltimore City. (DOBLER. J.)

Prayers.

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The facts are stated in the opinion of the Court.

The following are the prayers of the plaintiff and defendant, with the action of the trial Court upon the same:

Pltff.'s 1st Prayer—At the plaintiff's request the Court instructs the jury that if they find from the evidence that the plaintiff and defendant entered into a written contract, offered in evidence, dated August 19th, 1912, and that the plaintiff did the work therein mentioned, and did everything on his part to be performed in accordance with the terms of said contract except that the excavation and hauling were not completed within twenty working days or forty working days from August 19th, 1912, and that the plaintiff worked on said excavating and hauling after the expiration of forty working days, with the acquiescence and consent of the defendant, and that the defendant accepted and took possession of said work when completed, without making any objection thereto, except as to the time of completion, and if they find that the same was beneficial to the defendant, then their verdict must be for the plaintiff, and they must award him the reasonable value of the work done, at the contract price, which is *prima facie* evidence of such reasonable value, less such sums as they may find have been paid thereon and damages at the rate of \$95.00 per day by reason of any delay in the completion of the work or any part thereof not caused by the acts of the defendant or its agents; and the jury in their discretion, may award the plaintiff interest on the unpaid balance from the date on which they find that the excavating and hauling were completed. (*Granted as modified by the Court.*)

Pltff.'s 2nd Prayer—The plaintiff prays the Court to instruct the jury that if they find from the evidence that the plaintiff did not complete the work under the contract between himself and the defendant, which was read in evidence, within the time therein named for the completion of said work, and should further find that the defendant took

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Prayers.

possession of, occupied and built upon the work and the portions thereof as the same were completed by the plaintiff, and thereby made up and recovered all, or any part, of the delay of the plaintiff; and if they further find that the defendant was delayed by the default of other sub-contractors, should they find that other sub-contractors did work on said building, then the jury are instructed that the plaintiff can not be charged with the delay which was made up and recovered by the defendant, and the verdict must be for the plaintiff for the balance due under said contract, less only the damage sustained by the defendant by reason of the failure of the plaintiff to complete the work within forty working days from August 19th, 1912. (*Granted.*)

Pltff.'s 3rd Prayer—At the request of the plaintiff, the Court instructs the jury that if they find from the evidence that under the plans and specifications referred to in the written contract offered in evidence and made part thereof concrete piles were to be driven to obtain a better foundation for the building to be erected by the defendant company, and should further find that said plans and specifications were submitted to and examined by the plaintiff, and that the plaintiff was told by the agents and servants of the defendant that the digging was soft digging, and piles were to be driven, and if the jury further find that a test-hole had been sunk on the ground where the building was to be erected to ascertain the character of soil, and that all of these facts were known by the plaintiff, and should further find that by reason of these facts the plaintiff was misled by the defendant, and entered into said contract without any knowledge of the existence of rock stratum which was subsequently discovered in the cellar and foundation of said proposed building, if the jury find that rock stratum was found in said cellar and foundation; and if the jury further find that by reason of discovery of said rock, the plaintiff was delayed in excavating and hauling the material which he was required to remove within the time mentioned in the written

contract offered in evidence, nevertheless the plaintiff is entitled to recover the reasonable value of the work done, at the contract price, which is *prima facie* evidence of such reasonable value, less said sums as they may find have been paid thereon, without regard to any delay occasioned by the discovery and removal of rock. (*Refused.*)

Pltff.'s 4th Prayer—At the request of the plaintiff the Court instructs the jury that if they find that the defendant company entered upon the premises and took possession of, and built upon the portions of the first half of the cellar of the building to be erected, as soon as the work or portions thereof were completed, and without waiting for the expiration of the time limited in the contract for the completion thereof, then the defendant company thereby waived any damage by reason of the failure of the plaintiff to complete the excavation and hauling within the time mentioned in the contract, and the verdict of the jury should be for the plaintiff, for the reasonable value of the work done, at the contract price, which is *prima facie* evidence of such reasonable value, less such sums as they may find have been paid thereon. (*Refused.*)

Pltff.'s 5th Prayer—At the request of the plaintiff, the Court instructs the jury that under the true interpretation of the contract between the plaintiff and the defendant, dated August 19th, 1912, and offered in evidence, the blasting and removal of rock is not contemplated or comprehended therein, and if the jury find that the plaintiff did blast and remove rock from the cellar and foundation of the warehouse at Hillen and High streets, and the completion of the work to be done by him under the contract was thereby delayed, the jury is instructed that delay, if any the jury shall find, occasioned by the limited hours said blasting was done by direction of the city authorities, can not be charged against the plaintiff in doing the work required under the contract of August 19th, 1912. (*Granted as modified by the Court.*)

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Prayers.

Deft.'s Prayer—The defendant prays the Court to instruct the jury that if from the evidence they shall find that the plaintiff proposed in writing to the defendant to do certain excavating work at High and Hillen streets in Baltimore City, the first section of said work to be finished in twenty (20) working days, and the whole in forty (40) working days, and if the jury shall further find that the defendant accepted the plaintiff's proposal, then if the jury shall further find that the plaintiff did not complete the excavating work as mentioned in the plaintiff's proposal and accepted by the defendant, in the time limited in said proposal, then the jury is instructed as matter of law that the defendant is entitled to set off against the plaintiff's claim such sum as the jury may find to be due the defendant by computing the number of days over the time limited by the contract for the completion of the work and the time actually required and allow the defendant the sum of ninety-five dollars (\$95), the amount of liquidated damages provided in the contract, for each day's default and render their verdict for the plaintiff or defendant as the case may be, as one claim exceeds the other. (*Granted.*)

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

James Piper and *J. Bannister Hall, Jr.*, (with a brief by *Carey, Piper & Hall*), for the appellant.

Robert F. Stanton, for the appellee.

THOMAS, J., delivered the opinion of the Court.

This suit is on the common counts, and a special count which alleges "that on or about the 19th day of August, 1912, the plaintiff contracted with the defendant to perform

all the work in excavating at the Baltimore Fidelity Warehouse, corner of Hillen and High streets, in the City of Baltimore, according to drawings and specifications prepared by Emory & Nussear, Architects, including all trenches and footing foundations, at and for the price for excavating and hauling of \$1.35 per yard. Said work to be done within forty working days from the date of said contract," and that "The plaintiff has performed all of said work, and done all of the hauling provided for in said contract in accordance with the terms of said contract, and has fulfilled and done all things required to be done by him thereunder, together with extra work ordered by the defendant, but the defendant has not paid in full amount of \$9,981.45, which it agreed to pay, and there remains overdue and unpaid the sum of \$2,181.45." There was filed with the declaration an account in which the defendant is charged with the cost of digging 7,350 cubic yards of dirt at \$1.35, amounting to \$9,922.50, and a number of small items bringing the total charges to \$9,981.45, against which there is a credit of "By cash, \$7,800.00," leaving a balance of \$2,181.45.

The defendant pleaded that it "never promised" and that "it was never indebted as alleged," and, for a third plea, that the plaintiff was indebted to the defendant in an amount greater than the plaintiff's claim, etc. The seventh count of the plea of set-off charges "that on or about the 19th of August, 1912, the plaintiff contracted with the defendant to do certain excavating at the corner of Hillen and High streets, in the City of Baltimore, in accordance with certain plans and specifications, and all hauling at and for the sum of \$1.35 per cubic yard; part of said work to be done in the manner following: 'Beginning at the north end of the building and working toward the front to a distance of one hundred and twenty-five feet (125') to a depth required, including all trenches and footing foundations, same to be completed in twenty working days from the said 19th day of August, 1912.' And the said plaintiff further agreed to com-

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plete the whole work in forty working days. And the said plaintiff further agreed with this defendant to pay to it the sum of ninety-five dollars (\$95.00) per day as liquidated damages for each and every day thereafter exceeding either the twenty days or forty days time limit," and "that the plaintiff did not complete that portion of the work which under the terms of the said agreement was to have been completed in twenty working days, but on the contrary exceeded the time limit by twenty-nine working days. And the defendant claims \$2,755.00, which amount the defendant is willing to set off against the plaintiff's claim, and prays judgment for the excess."

The plaintiff joined issue on the first and second pleas and replied to the third plea that he never promised, etc., as alleged.

It appears from the evidence that a number of contractors, including the defendant, bid for the work of erecting, for the Baltimore Fidelity Warehouse Company, a large warehouse on the corner of Hillen and High streets according to drawings (blue prints) and specifications prepared by Emory & Nussear, architects, and that the plaintiff, a sub-contractor, submitted to the contractors bids for the work of excavating for the building in accordance with those drawings and specifications. The contract was awarded by the Warehouse Company to the defendant on the 17th of August, 1912. The building was to be two hundred and fifty feet long, and the contract between the defendant and the Warehouse Company provided that it should be completed within six months from the 17th day of August, and that the defendant should pay to the Warehouse Company a fixed sum per day for each and every day the completion of the building was delayed beyond that time, as liquidated damages, etc. It does not appear from the record what sum per day the defendant agreed to pay, but it is stated in the briefs of counsel for the appellant and appellee that the amount was \$95.00. The record contains the following extracts from the specifications, which

are said to be the only provisions relating to the necessary excavations:

"Excavation—Excavate for all foundation walls, piers, cappings to piles, etc., as may be shown or required. The earth taken from such excavations shall be used for leveling and filling in up to basement floor slab, and shall be filled in and well wetted and rammed in place around all walls, piers, etc., as the work progresses. Where necessary this contractor shall furnish and ram in place additional fill of good and substantial quality, and shall remove from the premises all superfluous earth, rubbish, debris, etc.

"Bailing—Bail and pump out all soil and water that may collect in the excavations from drains, springs, rain, or otherwise, and see that the excavations are well drained before any mason work is done in them.

"Note—Bidders shall visit site before submitting estimate on this work, and shall acquaint themselves with existing conditions. The work of this contract shall be so conducted and executed that it will not interfere in any way with the business of the Owner in and about the premises, and no street shall be blocked or so obstructed as to impede traffic.

"Piling—This Contractor shall furnish and properly place in position all piles necessary to properly support the building so that no settlement shall occur, all as shown and called for on drawings and in these specifications. Piles shall be of concrete, etc."

The plaintiff having submitted a bid to the defendant for the work of excavating for the building, the defendant, on the day it entered into the contract with the Warehouse Company, sent for the plaintiff, and the plaintiff and defendant entered into the following contract, in the form of an offer by the former and an acceptance by the latter:

"Baltimore, August 19, 1912.

Mess. John Cowan, Inc.

Gentlemen:—

I hereby propose to do all the excavating at the Bal-

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timore Fidelity Warehouse, corner Hillen and High Sts., according to drawings and specifications prepared by Emory & Nussear, Architects, as follows:

Beginning at the north end of the building and working toward the front to a distance of 125 feet and to the depth required, including all trenches and footing foundations, same to be completed in twenty working days from above date. I also further propose to complete the entire excavation necessary for the building within forty working days from above date.

The price for excavating and hauling away same to be *One Dollar and Thirty-five Cents* (\$1.35) per yard.

I also further agree that if at any time you should see fit to put a steam shovel on the works I will haul the dirt away after being loaded on my wagons by the steam shovel for the sum of *One Dollar* (\$1.00) per yard and will agree to take from this shovel 300 yards per day.

I further agree to pay to you the sum of \$95.00 per day as liquidated damages for each and every day thereafter exceeding either the twenty or forty day time limits.

Terms: eighty per cent. of the value of the work completed each week, balance within thirty days after completion.

Yours respectfully,

Accepted: (Signed) Wm. Meyer.

(Signed) John Cowan, Inc.,

(Seal) By Wm. B. Norris."

Plaintiff states that he began excavating for the building on the 19th of August, 1912, and completed the work on the 25th of the following October. During that time there were nine Sundays and twelve days on which he could not work on account of rain, making in all twenty-one days which were not working days. He says that he "was to complete the first half of the contract in twenty days, and twenty days

additional for the second half"; and that he completed the excavations in forty-six days, which, "according to his calculation, was six days over the forty days' period in the contract"; that he could not tell when he completed the first half of the work because he "didn't keep any dates at all for the first half," and does not deny that it was not completed until the fifteenth of October. Referring to a conversation between the plaintiff and Mr. Tase, the vice-president of the defendant, on the day the plaintiff entered into the contract, and immediately preceding its execution; plaintiff was asked by his counsel the following question: "What, if anything, was said by Mr. Tase and you at that time about the character of the soil or the character of the digging that was to be done by you?" The question was objected to by the defendant, but the Court below overruled the objection, which ruling is the subject of the first exception, and the plaintiff replied: "Mr. Tase said to me, Meyer, you know that this job must go on in a hurry, and I said, I am the man that can do it in a hurry. Now, then, I said, Mr. Tase, how many yards of dirt have you there? I don't understand blue prints; tell me how many yards of dirt you have there, and I will tell you how long it will take me to dig it out. He said about 6,000 yards, and I said, If you have 6,000 yards of dirt there I will move it in 40 days, and he said, Couldn't you give me half of the cellar in twenty days and the balance in 40 days? and I said, Well, I don't think there would be any trouble to do that, but we can start from one end and go out at the other end. I said, I guess the digging will be very good there, because they have a test-hole over there at the corner and they are going to drive piles and the digging is going to be fine. and he said, The digging is going to be lovely, because a test-hole has been dug and there is going to be good digging, and I said, If that is the case I can get the job out in 40 days." Plaintiff further testified that before making any bids for the work he examined the test-hole, which had been dug by the Warehouse Company or the Rail-

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road Company, and the blue prints and specifications, which provided for piles to be driven, etc., and that the statement of Mr. Tase, the conditions shown by the test-hole and the provision in the specifications in regard to piles led him to believe that the earth would be "soft" and that "the digging would be good"; that after he and his employees had worked about sixteen days, and "had the cellar at grade" and "were digging the footings where the piles were to go" they "struck nothing but a bed of solid rock"; that he had to go to the City Hall to get a permit to "blast out the rock"; that the rule of the Engineer's Department prohibited blasting "where teams are passing," except after six o'clock in the evening and early in the morning; that he "took out" 456 cubic yards of rock and 7,350 cubic yards of dirt, and that the delay in completing the work within the time specified in the contract was due to the rock and the fact that he could not do any blasting except at the hours named; that the defendant did not pay him "for all the dirt he dug and hauled away"; "that there was still due him the sum of \$2,181.46, figured out on the basis of \$1.35 per cubic yard for the dirt taken out," and that he had demanded the \$2,181.45 from the defendant, but that it had declined to pay it on account of the delay in completing the work.

According to the evidence produced by the defendant, nothing was said by Mr. Tase to the plaintiff about the character of "the digging" to be done, and the plaintiff never intimated that the contract did not include blasting and moving rock until he testified in this case. The provisions of the contract between the defendant and the Warehouse Company in respect to the time allowed for the erection of the building and the obligation of the defendant in the event of its failure to comply with that requirement were made known to the plaintiff, and the clause in the contract we are now considering requiring the plaintiff to complete the first half of the excavations within twenty working days was inserted for the purpose of enabling the defendant to com-

mence the erection of the foundation and walls of the northern half of the building while the plaintiff was excavating for the other half. Mr. Tase states that excluding Sundays and holidays, and counting only "the days on which the work could be done," twenty working days from the 19th of August extended to the afternoon of the 11th of September, 1912; that the first half of the excavations was not completed until the 15th of October, and that there were "thirty-four days overtime on the first half of the contract" for which the defendant was entitled to claim \$95.00 per day; that he "has had a great deal of experience in excavating work of that character * * * and in his opinion there was no reason why the excavating" for "the first half of the building could not have been done in twenty working days;" that the defendant had made up the "time lost" through plaintiff's "delay;" but that it had cost the defendant a great deal of money to do it. On cross-examination he further stated that the building was not completed within six months, and that the Warehouse Company had deducted about \$2,000.00 from the contract price for that reason.

There is no charge made in the account for blasting and moving the rock referred to, and the items of the account are not disputed. Nor is there any serious conflict of evidence in regard to the number of days the plaintiff was engaged in the work beyond the twenty days limit, which, according to the defendant's evidence was from twenty-six to thirty-four days. The record contains about eighty pages of testimony, most of which was offered for the purpose of showing the cause of the delay and that the defendant was not damaged by reason thereof, and there are thirteen exceptions to the rulings of the Court in respect thereto, but the brief reference we have made to the evidence is sufficient to show that the important questions to be determined are, first, whether the \$95.00 per day mentioned in the agreement is to be treated as a penalty, or, in the language of the contract, as liquidated damages, and the effect of that provision upon the rights of the parties, and, second, whether the

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plaintiff can, under the circumstances and in this case, rely upon the fact that he encountered rock as an excuse for his failure to complete the first half of the excavations within the time specified.

The rules by which we are to be guided in the solution of the first question with which we are here confronted are clearly stated in the very recent case of *The Baltimore Bridge Company v. United Railways and Electric Company, Ante*, page 208, where the previous decisions of this Court and of other courts are referred to and fully discussed in the opinion prepared by JUDGE PATTISON. It is there said: "From the authorities given above, it may be stated as a settled rule of law, that where the parties, at or before the time of the execution of the contract, agree upon and name a sum therein to be paid as liquidated damages in lieu of anticipated damages which are in their nature uncertain and incapable of exact ascertainment, that the amount so named in the agreement will be regarded as liquidated damages and not as a penalty, unless the amount so agreed upon and inserted in the agreement be grossly excessive and out of all proportion to the damages that might reasonably have been expected to result from such breach of the contract. And whether it is excessive or whether the damages are incapable of exact ascertainment should be determined from the subject-matter of the contract considered in the light of all the surrounding facts and circumstances connected therewith and known to the parties at the time of its execution." It appeared in that case that the Railways Company had entered into a contract with the City in reference to the work referred to in the contract between the Railways Company and the Bridge Company, and JUDGE PATTISON, after referring to the fact that the contract with the City had not been admitted in evidence, said in reference to it: "What covenants, if any, were made by the railway company to the City in the aforesaid contract by which they were to become liable to the City for the loss or damage it might sustain because of the failure to complete the work within the time

named, are not disclosed by the record. If the said contract contained such covenants, then any anticipated damages resulting to the company by reason of a breach thereof, occasioned by the aforesaid breach of the contract with the appellant company, could have been properly considered with the other anticipated damages in determining the amount of the liquidated damages to be inserted in the agreement."

In the case at bar the defendant had entered into a contract with the Warehouse Company to erect the warehouse within a definite time, and had agreed to pay to the Warehouse Company a fixed sum per day (which, according to briefs of counsel, was \$95.00) as liquidated damages for every day the completion of the building was delayed beyond that time. The plaintiff was fully advised of these provisions of the contract between the defendant and the Warehouse Company, and that the time consumed in the work he was about to undertake was a matter of great importance to the defendant. The position of the parties was such as to render it difficult if not impossible to anticipate with any degree of accuracy the consequences to the defendant of a failure to do the work within the time the plaintiff agreed to do it, and the damages which the defendant would sustain by reason of such failure were, in the language of this Court in *United Surety Co. v. Summers*, 110 Md. 95, "in their nature uncertain and unascertainable with exactness," and might "be dependent upon extrinsic considerations and circumstances." We cannot say that the amount named is "grossly excessive and out of all proportion to the damages that might reasonably have been expected to result from such a breach of the contract," especially in view of the statement of counsel that a like sum had been agreed upon as the measure of damages for a similar breach of the contract between the defendant and the warehouse Company. Having regard therefore to the subject-matter of the contract, the position of the parties and the surrounding facts and circumstances existing at the time of its execution, there is no reason why we should not give effect to the terms of the

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agreement and treat the sum designated as "liquidated damages," as the measure of compensation to which the defendant is entitled by reason of the breach.

This construction of the contract eliminates the question of the *actual* damages the defendant sustained by reason of the failure of the plaintiff to complete the first half of the excavations within the time specified. In other words, the effect of the clause we are considering is to substitute the amount agreed upon as liquidated damages for the *actual* damages resulting from the breach, and, as said by Mr. Brantly in his excellent work on *Contracts*, "the party who failed to perform the contract will not be heard to say that the other party has not suffered any damages from the breach, or that his loss did not equal the sum named. The very object of the clause is to prevent such a controversy." *Brantly on Contracts* (2nd Ed.), section 163; *Willson v. Baltimore City*, 83 Md. 203; *Baltimore Bridge Company v. United Railways, etc., Company, supra*.

Nor can the plaintiff rely upon the fact that he was compelled to blast and move rock in order to accomplish the work he undertook, to relieve him of the consequences of his failure to complete the excavation within the time agreed upon. The contract provided that he was "to do all the excavating at the Baltimore Fidelity Warehouse * * * according to drawings and specifications prepared by Emory & Nussear, Architects, as follows: Beginning at the north end of the building and working toward the front to a distance of 125 feet and to the depth required, including all trenches and footing foundations, same to be completed in twenty working days from" the date of the contract. The time in which the work was to be done was not made dependent upon the kind of material he had to move, and there is no provision in the contract or specifications to the effect that if in the course of the work he had to blast and move rock the time limit should not apply, or to in any way qualify an absolute undertaking to complete the first half of the excavations within the time stated. The specifications cautioned

bidders to "visit the site" and to "acquaint themselves with existing conditions before submitting estimates on" the work, and the plaintiff says he examined the test-hole and the drawings and specifications. If after doing so he was satisfied as to the kind of work required, and was willing to enter into a contract to complete it within a certain time without any provision to protect him from the consequences of a mistake in regard to the character of the material to be moved, he cannot in a suit at law to recover for the work he did under the contract avoid liability for his failure to comply with its terms by showing that the work was harder or more difficult than he had anticipated. The rights of parties to a contract must be determined by the terms of the agreement they have voluntarily made. Courts cannot make a different contract for them, or relieve them of the consequences of a bad bargain. This case is not unlike the case of *Simpson v. United States*, 172 U. S. 372, where the Court held, quoting from the syllabus: "That the contract imposed upon the contractors the obligation to construct the dock according to the specifications within a designated time, for an agreed price, upon a site to be selected by the United States, and contained no statement, or agreement or even intimation that any warranty, express or implied, in favor of the contractor was entered into by the United States concerning the character of the underlying soil." In the case of *Taylor v. Turley*, 33 Md. 500, JUDGE STEWART, in answer to the contention that subsequent events rendered the consideration for the defendant's promise so inadequate that it would be unjust to hold him bound by the terms of his contract, said: "Whether he made a good or bad bargain, or received a full equivalent for what he promised to pay, cannot affect the legal character of his obligation." In the case of *United States v. Gleason*, 175 U. S. 585, the Supreme Court said that one of the well-settled rules of law "is that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless his performance is rendered impossible by the act of God, the law, or the

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other party. Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none—nor, in such circumstances, can equity interpose.” And it is said in 6 *Cyc.* 70, “A builder who has improvidently assumed an absolute liability when he might have undertaken a qualified one only, is not excused from performing his engagement unless prevented by the act of God, the law, or his employer; no hardship, no unforeseen hindrance, no difficulty short of absolute impossibility will excuse him from doing what he has expressly agreed to do. Thus, he is not excused from performance because of a latent defect in the soil,” etc. The plaintiff admits that the delay in completing the work was not caused by the defendant but claims that it was due in part to an ordinance or rule of the “Engineer’s Department” forbidding blasting except during an early hour in the morning or late in the evening, and his counsel contends that the case comes within the exception which relieves a party where performance is rendered impossible by law. The obvious answer to this suggestion is, first, that there is no evidence to show that the ordinance or rule referred to was not in force at the time the contract was made, and it must be presumed that it was made with reference to all lawful rules and regulations affecting the work to be done under it, and, second, that the rule prohibiting blasting except during the hours named did not make performance impossible, but, at most, only rendered it more difficult. It is said in 9 *Cyc.* 631: “The exception does not apply, however, where the impossibility created by the law is only temporary, where the change merely makes performance more burdensome.”

As we have said, the items of the plaintiff’s account are not disputed, and as he did the work and it was accepted by the defendant, he is entitled to recover for it under the common counts at the contract price. But as the first half of the work was not completed within the time specified in the contract, the defendant was entitled under the pleadings to

set off against the plaintiff's claim of \$95.00 per day for every day consumed in the completion of the first half of the excavation beyond the twenty days mentioned, as the measure of defendant's damages for the breach, and to a verdict for any excess over plaintiff's claim the jury might find. 1 *Poe* (3rd Ed.), sec. 101; *Orem v. Keelty*, 85 Md. 337; *Baltimore City v. Kinlein*, 118 Md. 336; Code of 1912, Art. 75, secs. 12 and 13.

The evidence embraced in the first exception, which we have set out above, was not admissible. The contract is free from ambiguity, and as it does not contain any warranty on the part of the defendant in respect to the amount of "dirt" to be moved or kind of "digging" to be done by the plaintiff, its terms cannot be varied or added to by evidence of what was said by the parties prior to its execution.

The remaining exceptions to the evidence refer to evidence introduced for the purpose of showing that the failure of the plaintiff to complete the excavations within the time allowed did not delay defendant in the erection of the building or result in any damage to the defendant, and for the reasons we have already stated there was error in the rulings of the Court below in admitting it.

At the conclusion of the evidence the Court below granted the plaintiff's first, second and fifth prayers, and the defendant's prayer. The Reporter is requested to set out plaintiff's first prayer in his report of the case. By the plaintiff's second prayer the jury were instructed that if they found that the defendant "made up and recovered all, or any part of the delay of the plaintiff," etc., "then the plaintiff cannot be charged with the delay which was made up and recovered by the defendant," and by his fifth prayer the jury were told that "under the true interpretation of the contract between the plaintiff and defendant * * * the blasting, and removal of rock is not contemplated or comprehended therein," and that if they found that the plaintiff "did blast and remove rock from the cellar and foundation of the warehouse * * *, and the completion of the work to be done by him under the

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contract was thereby delayed, then the delay caused by the limited hours said blasting was done by direction of the City authorities, cannot be charged against the plaintiff." These prayers are covered by what we have already said in regard to the construction of the contract, the rights of the parties under it and the plaintiff's reliance upon the fact that he had to blast and move rock, and cannot therefore be approved. The second prayer is open to the further objection that it is in conflict with the plaintiff's first prayer and the defendant's prayer which were granted by the Court.

The plaintiff's first prayer is based upon the theory that the defendant is entitled to an allowance of the \$95.00 per day mentioned in the contract as liquidated damages, which is in accordance with the proper construction of the contract, but we think in other respects it was calculated to mislead the jury. By the terms of the contract the plaintiff was allowed twenty working days within which to complete the first half of the excavations and forty days for the completion of the "entire excavations." He could not, of course, escape responsibility for a breach of his agreement in regard to the first half by hastening the completion of the second half, and if he had complied with the contract in reference to the first half, but failed to do so in respect to the remaining half he would have been liable to the extent that he exceeded the forty days limit. But if the delay occurred in the first half of the work and he was charged with the number of days he exceeded the twenty days limit, he could not, under any fair construction of the contract, be charged *with the same time* in allowing the defendant for a breach of the contract in respect to the forty days period. That would result in a *double charge*. In the seventh count of the plea of set-off the defendant only alleges the breach of the agreement to complete the *first half* of the excavations within the twenty days. It could, of course, under a different state of facts, have recovered also on the common counts, the \$95.00 per day for a breach of the time limit in respect to the remainder of the work, but notwithstanding the plaintiff

testified that he exceeded the forty days limit for the "entire excavations," the evidence shows that all of the delay occurred in the completion of the first half of the work, and the only claim made by the defendant in the evidence is for *that* delay. The form of the prayer might have led the jury to believe that they should add, to the number of days, the time consumed in the completion of the first half of the work. exceeded the twenty days limit, the six days delay in the completion of the entire excavation beyond the forty days, whereas, in allowing the defendant for the breach of the contract, they should, under the evidence in the case, have been confined to the number of days the completion of the first half of the work was delayed beyond the twenty days period. This error in the prayers could not have prejudiced the defendant, but inasmuch as the case will be remanded for a new trial we deem it advisable to call attention to it, and for a like reason we may add that the same criticism applies to the defendant's prayer, which is not strictly before us on this appeal. Another objection to plaintiff's first prayer is that it instructed the jury that they could allow the plaintiff. interest on the balance found to be due him from the date the excavations and hauling were completed, whereas the contract provides that eighty per cent of the cost of the work should be paid each week and the "balance within thirty days after completion."

For the errors indicated the judgment will be reversed and case remanded for a new trial.

Judgment reversed, with costs and a new trial awarded.

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Syllabus.

COMMISSIONERS OF DELMAR, A CORPORATION.

vs.

JOHN S. VENABLES.

*Municipal corporations: streets, duties as to --; negligence.
Res gestæ.*

The offering of testimony, by a defendant, to prove the issue, after the Court has refused his prayer to instruct the jury that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, is a waiver of his right to have the ruling reviewed upon appeal. p. 475

A municipality can not be made liable for injuries received owing to the condition of its streets, unless it be shown that it had actual or constructive notice of their bad condition. p. 476

By "constructive notice" is meant such notice as the law imputes in the circumstances of the case. p. 476

It is the duty of a municipality to exercise active vigilance over the streets, to see that they are kept in a reasonably safe condition for travel. p. 476

In the exercise of such active vigilance, in keeping the streets in a reasonably safe condition for public travel, the officers of a municipality are expected to inspect the streets from time to time, and to do the repair work found necessary. p. 476

After a street has been out of repair, so that the fact has become notorious to those traveling the street, and there has been full opportunity for the municipality, through its agent charged with that duty, to learn of that condition, and to make the repairs, the law imputes notice to it, and charges it with negligence if it fails in such duty, to the damage of someone injured thereby. p. 476

Where a municipality, in constructing a street, had left a stump in the bed of the street, which as the earth had been worn away by passing vehicles, was left projecting some six or seven inches above the surface, and where by the exercise of reasonable care and diligence, its officers could have learned of the dangerous condition and have corrected the same, and so have prevented an injury complained of, there was evidence of negligence on the municipality's part legally sufficient to go to the jury. pp. 476-477

To justify a court in saying that conduct is *per se* contributory negligence, it must present such features of negligence as to leave no opportunity for difference of opinion in the minds of ordinarily prudent men as to its imprudence. p. 478

The fact that the person injured by the overturning of his wagon because of its being driven over a small stump of a tree that had been left projecting from the bed of the street, was riding on the top of a load of fodder, where he could not see all of the surface of the street, is not as a matter of law contributory negligence. p. 478

Exclamations or expressions which are the spontaneous manifestations of distress, and which naturally accompany and furnish evidence of existing suffering, are the natural language of pain, and whenever its existence at any particular time is a relevant fact is always admissible as original evidence, under the rule of *res gestæ*. p. 479

They are in the nature of verbal facts, and may be testified to and described by anyone in whose presence they were uttered. p. 479

Decided April 7th, 1915.

Md.]

Opinion of the Court.

Appeal from the Circuit Court for Wicomico County.
(STANFORD, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UENER, STOCKBRIDGE and CONSTABLE, JJ.

F. Leonard Wailes (with a brief by *Ellegood, Freeny and Wailes*), for the appellant.

Elmer H. Walton (with whom was *Alonzo L. Miles* on the brief), for the appellee.

PATTISON, J., delivered the opinion of the Court.

The suit in this case was brought by the appellee against the appellant, a municipal corporation, to recover damages for personal injuries sustained by him resulting from its alleged negligence.

The appellee, with one Truitt, on the 22nd day of November, 1913, was riding on a load of fodder upon Sixth street, one of the streets of the appellant corporation, when the right wheel of the cart upon which the fodder was loaded, passed over a stump six or seven inches above the level of the road and about four inches in diameter at its top, throwing the appellee and Truitt from the cart upon the sidewalk, inflicting upon the appellee the injuries complained of. The position of the appellee was upon the top of the fodder and about over the center of the load. The cart was drawn by one horse, which at the time was driven by the appellee.

Sixth street, or at least this portion of it, was opened about two years prior to the happening of the accident, and when opened the said stump was permitted to remain in the street. The street is about twenty feet in width, with a pavement

two and one-half feet wide on the west side, but with no pavement on the east side. The stump was on the east side, in the traveled portion of the street, about five feet from the building line. At the time the street was opened the stump was in the center of a small mound or hill very little higher, if any, than the earth surrounding it, but the vehicles upon the street, in time, removed or wore away the earth, leaving the stump with an elevation of six or seven inches above the surface of the street, and this had been its condition for a long while prior to the accident. The appellee himself saw it in this condition while traveling upon the street in April or May of 1913, but the evidence does not disclose that he afterwards saw it. Truitt had seen the stump before the accident, but just how long before he could not say. Sturgis testified that "he had seen it many times before this accident and ran into it one day and it liked to have thrown him off." He described the stump as being "six or seven inches high and a little over four inches across the top." Culver, another witness, testified that "the stump was there when the street was opened, it was a fruit tree stump that had been cultivated around and a bank thrown up around it; that he ran into it once and maybe more." The appellee testified that he was driving along the best he could, looking for this stump, but, as he expressed it, "when you get upon a load of fodder you cannot see right down where the stump is"; to see it at all he had to see it at some little distance before he reached it. In describing the stump he said "it was an apple tree stump the color of dirt as near as he ever saw a stump, a hard stump to see, and that you had to be looking mighty good if you didn't have any load at all" to see it. Truitt, who was with him on the cart, testified that the plaintiff "was driving along with the lines to his horse in an ordinary gait, walking his horse, when the cart struck the stump."

The appellee and Truitt are the only witnesses who testified as to how the accident happened, either on the part of the plaintiff or defendant.

Md.]

Opinion of the Court.

The trial of the case resulted in a verdict for the plaintiff, upon which a judgment was entered; and it is from that judgment that this appeal is taken.

There are four exceptions to the rulings of the Court. **The first and third are to the rulings upon the admission of testimony, and the second and fourth are to the rulings upon the prayers.**

At the conclusion of the plaintiff's testimony the defendant asked the Court to instruct the jury that there was no legally sufficient evidence entitling the plaintiff to recover, and upon the Court's refusal to grant it, the defendant thereafter offered testimony on its own behalf upon the issues joined.

This exception is not in this case. The taking of testimony by the defendant to sustain the issues on its part, after the refusal of the Court to grant the said prayer, was a waiver of its right to have such ruling thereon reviewed upon appeal. *Barabasz v. Kabat*, 91 Md. 53; *United Ry. Co. v. Deane*, 93 Md. 624; *New York, etc., R. Co. v. Jones*, 94 Md. 35; *Knecht v. Mooney*, 118 Md. 583.

This prayer, however, was renewed at the conclusion of all the evidence in the case and with it another prayer was offered by the defendant asking the Court to take the case from the jury because of the alleged negligence of the plaintiff directly contributing to the injury. It is urgently insisted by the appellant that the Court erred in its rulings upon these prayers, and it is upon such rulings that the appellant chiefly relies for a reversal of the judgment.

It cannot be successfully contended that there was no legally sufficient evidence to go to the jury tending to show negligence on the part of the defendant when we apply to the facts disclosed by the record the well settled law of this State in relation to the legal sufficiency of evidence as laid down in the cases of *M'Elderry v. Flannagan*, 1 H. & G. 308; *Leopard v. Ches. & Ohio Canal Co.*, 1 G. 222; *Jones v. Jones*, 45 Md. 154; *Baltimore Elevator Co. v. Neal*, 65 Md.

459; *Mallette v. British Assn. Co.*, 91 Md. 481; *Moyer v. Justis*, 112 Md. 222, and other cases.

The defendant municipality opened this street about two years prior to the happening of the accident, leaving the said stump in the bed of the street, at that time partially relieved of its dangerous features by the dirt that was piled around it, but which was naturally to become more dangerous as the dirt wore away from it by the use of vehicles upon the street. The dangerous condition of the stump at the time of the accident had existed for at least six months prior thereto, how much longer the record does not disclose, and its condition was known to those who traveled upon such highway, as disclosed by the evidence of the above named witnesses.

The law is well settled that the municipality cannot be made liable in any case unless it be shown that it had actual or constructive notice of the bad condition of the street. By constructive notice is meant such notice as the law imputes in the circumstances of the case. It is the duty of the municipal authorities to exercise an active vigilance over the streets; to see that they are kept in a reasonably safe condition for travel. They cannot fold their arms and shut their eyes and say they have no notice. After a street has been out of repair so that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice and charges it with negligence. *Todd v. City of Troy*, 61 N. Y. 509; *Keen v. Havre de Grace*, 93 Md. 39; *Müller v. United Ry. & Elec. Co.*, 108 Md. 95.

In this case the officers of the defendant corporation knew of the stump in the street at the time the street was opened and they permitted it to remain there, subject to the natural changes in its physical condition produced by vehicles passing over it in the use of the street, for two years and until the accident occurred. In the exercise of an active vigilance in keeping the street in a reasonably safe condition for pub-

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Opinion of the Court.

lic travel, the officers of the municipal corporation are expected to inspect the streets from time to time and to do what work is found necessary to keep them in such reasonably safe condition. And it is difficult for us to understand, if this was done, how such officers of the corporation, with the knowledge of the existence of the stump in the street, could have failed, in such length of time, to have learned of its dangerous condition here complained of.

It is true, this Court has said, *Keen v. Havre de Grace, supra*, that if the defect be of such a character as not to be readily observable, express notice to the municipality must be shown. In this case there is evidence, the evidence of the plaintiff, that it was a hard stump to see; yet it must be remembered that this stump had been in this condition for months, and while hard to see, its presence in the street was brought to the notice of the travelers upon the street by repeatedly coming in contact with it, until it seems its presence there became more or less notorious. And, moreover, it must be borne in mind that the commissioners had actual notice of the existence of this stump in the street, left there by them when the street was opened, and although at such time it might not have seriously endangered the safety of travel upon the street, yet it was liable to become so, and this fact should have been known to them and because of which their attention should have been more or less directed to it in seeing that the street was at all times kept in a reasonably safe condition for travel.

The facts disclosed by the record tending to show that by the exercise of reasonable care and diligence, the officers of the defendant corporation could have learned of the dangerous condition of the street in time to have remedied it and to have prevented the injury complained of, were legally sufficient to go to the jury for such purpose, and the Court committed no error in refusing to grant this prayer of the defendant.

The Court also, in our opinion, committed no error in its ruling upon the defendant's prayer charging the plaintiff with contributory negligence.

To justify a Court in saying that conduct is *per se* contributory negligence, the case must present some such feature of recklessness as would leave no opportunity for difference of opinion, as to its imprudence, in the minds of ordinarily prudent men. *Balto. & O. R. R. Co. v. Fitzpatrick*, 35 Md. 46; *Balto. & Potomac R. R. Co. v. State, use of Stansbury*, 54 Md. 655; *Cumberland Valley R. Co. v. Maugans*, 61 Md. 61; *Balto. & O. R. Co. v. Kane*, 69 Md. 21; *Balto. & O. R. Co. v. State, use of Wiley*, 72 Md. 40; *Taxicab Co. v. Emanuel*, 125 Md. 246.

What is the negligent or reckless act of the plaintiff in this case? The fact that he was riding upon the load of fodder, which was securely tied to the cart, cannot be regarded as an act of contributory negligence. Upon a cart so loaded this was about the only place that he could have ridden. It is true that in this position he could not have seen the stump at a point so close to his cart as he could had he been riding in an unloaded cart, but we cannot say, as a matter of law, that his riding upon the load of fodder was a negligent act. He was not obliged to walk and drive his horse, to avoid the charge of negligence; but had he done so, the stump on the right side of the road would not probably have been any more readily seen by him from the driver's usual and customary position to the left of the horse, than from the top of the loaded cart. As the plaintiff had seen the stump six months before and not knowing whether or not it had been removed, although he might well have thought that in that time it had, he was looking for it and "was driving the best he could" to avoid it, and in so doing it would seem that he was exercising reasonable and ordinary care, and this was all that was required of him.

We fail to find any negligent act of the plaintiff contributing to the accident, and therefore the Court correctly ruled in refusing this prayer.

Md.]

Opinion of the Court.

We find no errors in the rulings of the Court upon any of the rejected prayers of the defendant, nor in its ruling upon the amendment to its seventh prayer. As to the sixth prayer of the defendant, the amendment is not shown by the record.

The plaintiff's prayers as amended, when considered with the granted prayers of the defendant and in the light of all the facts and circumstances of the case, were, we think, properly granted and the law of the case as presented by the granted prayers, including those of the plaintiff and defendant, was as favorable to the defendant as it was entitled to receive.

This leaves the first and third exceptions to be disposed of.

In the progress of the trial Hudson, a witness, testified that he was in his cart nearby at the time of the accident, that he jumped from his cart, went to the plaintiff, took hold of him and asked him if he were hurt; "he hollered and said 'My thigh is broken all to pieces.'" Although it had permitted, without objection, a previous witness to give a similar answer, the defendant asked that this answer be stricken out, and upon the Court's refusal to strike it out an exception was noted, which is the first exception in this case.

As was said in *Williams v. Great Northern Ry. Co.* (Minn.), 37 L. R. A. 202, "Exclamations or expressions which are the spontaneous manifestations of distress, and which naturally and instinctively accompany and furnish evidence of existing suffering, are the natural language of pain; and, whenever its existence at any particular time is a relevant fact, such manifestations of it are always admissible as original evidence, under the ordinary application of the rule of *res gestae*. They are in the nature of verbal facts, and may always be testified to and described by any person in whose presence they were uttered. We take it that it is expressions of this nature to which Mr. Greenleaf refers when he says: "Wherever bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also orig-

inal evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof of its existence, and whether they were real or feigned is for the jury to determine."

In *Atchison, etc., R. Co. v. Johns*, 36 Kan. 769, the Court there said: "Whenever evidence is introduced tending to show a real injury or a real cause of suffering or pain, as in this case, the declaration of the party concerning such suffering or pain while it exists and as simply making known an existing fact, should be allowed to go to the jury for what they are worth, and the jury in such a case should be allowed to weigh them and determine their value." *Federal Betterment Co. v. Reeves*, 77 Kan. 111, 15 Amer. & Eng. Ann. Cases, 798.

The answer we think was properly admitted as evidence of the plaintiff's pain and suffering at such time. The expression that he had broken his "thigh all to pieces" was to be taken for what it was worth when considered in connection with the other testimony of the case; it was at least indicative of the extent of pain that he was at the time suffering.

Dr. Lynch, a witness offered by the defendant, testified that he saw the plaintiff a short while after the accident and examined his injuries and thereafter paid him eight or ten visits during the succeeding thirteen days; that he was still going upon crutches at the time he stopped visiting him; that he saw nothing during his treatment and examination to cause a permanent injury; "the ligaments were in perfect condition; there was nothing to indicate a fracture or displacement, and there was no shortening, at the time that you usually get from a fracture or displacement of any sort. That there might have been some laceration of the fibres of the hip attached to the femur." He was then asked the following hypothetical question: "Doctor, assuming that Mr. John S. Venables, the plaintiff in this case, was, prior to the injury referred to in the evidence, in good health, with both

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Opinion of the Court.

legs normal; that on the 22nd day of November, 1913, he was thrown from a loaded wagon which had come suddenly in contact with a stump in the road to the pavement, his body striking the pavement from his knee to his hip, resulting in the condition in which you found him in the evening of the same day, and that he has had no external injury of any kind since that day, and further assuming that one leg is now shorter than the other, and that the short leg has wasted very much in size as compared with the other's size, to what would you attribute that condition?" The question was objected to, but the objection was overruled, and the witness answered, saying, "I haven't seen him since I discharged the case; I couldn't answer that question." He was then asked: "Doctor, would you say that his present condition as I have described it to you is not due to the injury received in the fall?" to which question the defendant objected, but the objection was overruled, and he answered, "No, I wouldn't say it wasn't." It is to the admission of this last answer in evidence that the third exception is taken.

The evidence of the plaintiff showed the facts alleged in the hypothetical question. The witness had previously stated in his examination in chief that he saw nothing during his treatment and examination to cause a permanent injury, and upon cross examination he was asked "Do you say his present condition as I have described it is not due to the injury received in that fall." This, we think, was a proper inquiry upon cross-examination, and the answer thereto was admissible.

We find no errors in any rulings of the Court and we will, therefore, affirm the judgment.

Judgment affirmed, with costs to the appellee.

MAYOR, ETC., OF HAGERSTOWN, ET AL.,

vs.

JOSEPH YOUNG, SR.,

*Appeals: facts in the record only. Municipal corporations:
private property; compensation.*

The Court of Appeals will not consider facts or plats that are not in the record, and whose accuracy is denied by the other side. p. 485

A general demurrer to a whole bill can not be sustained if the relief prayed in any part of the bill is proper. p. 484

Municipal authorities have no right to take or occupy any part of private property without due compensation therefor. p. 484

Decided April 7th, 1915.

Appeal from the Circuit Court for Washington County.
(In Equity.) (KEEDY, J.)

The facts were stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Alexander R. Hagner, for the appellants.

Albert J. Long, for the appellee.

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Opinion of the Court.

BORD, C. J., delivered the opinion of the Court.

The appellee filed a bill for an injunction against The Mayor and Council of Hagerstown, The Board of Street Commissioners and the Street Superintendent. The prayers of the bill were: (1) That the defendants be enjoined and restrained "from entering upon, digging up or changing the grade of that portion of the complainant's lot of ground which lies in the acute angle" therein described; (2) that they be enjoined and restrained from removing or taking away certain hay scales therein mentioned, or otherwise interfering with the reasonable use of the same by the complainant, and from changing the grade of the ground at the approaches of said scales so as to impair the reasonable use of said scales, and (3) for general relief.

An injunction was granted and the defendants filed a demurrer to the whole bill, in which the only ground given was "That the plaintiff has not stated in his bill such a case as entitled him to any relief in equity against the defendants." The same day a motion for the dissolution of the injunction was made, but no answer to the bill was filed, and as the motion does not appear to have been acted upon it is unnecessary to determine whether the Court could properly have entertained such a motion before an answer was filed, unless a demurrer to the bill had been previously sustained. Without discussing the question, we will simply refer to *Alexander's Chancery Practice*, 85, and Preface, page X, and *Miller's Eq. Proc.* 700. The demurrer was overruled, and the only appeal taken was from the order overruling the demurrer, none being taken from the order granting the injunction.

The appellants' solicitor devoted most of his argument to showing that the hay scales, being, as he claims, in the street, and not shown by the bill to be there by any lawful authority or any right vested in the appellee, can lawfully be removed by the municipal authorities in making the contemplated improvements on Baltimore street, referred to in the bill. The bill does not show by what authority the hay scales were

placed where they are, but we do not feel called upon to pass on the right, if any, of the appellee to maintain those scales, as the order of the Court must be affirmed, regardless of that question.

The bill does sufficiently allege that the defendants are about to dig up and change the grade of a part of complainant's lot, which lies in an acute angle formed by the intersection of Potomac and Baltimore streets, and a sidewalk running along the north side of and adjacent to the building on plaintiff's lot. Apparently a part of that strip is included in plaintiff's deed, and the bill alleges that it is a part of complainant's lot. There is nothing in the bill to show that he or his predecessors had surrendered that part of the lot to the city. If it be a part of his lot, then unquestionably the municipal authorities have no right to take it without his consent or paying him just compensation for it. It may be a small part of the lot, but that does not justify the appellants in taking it.

That is one of the things for which the appellee specifically asked relief, and, so far as the record shows, he was entitled to that relief, regardless of the other question about the hay scales. Inasmuch as the appellants filed a general demurrer to the whole bill, if it was good as to part only, the demurrer must be overruled. *Miller's Eq. Proc.* 173; *Miller v. Baltimore Co. Marble Co.*, 52 Md. 642, 646; *Dennison v. Yost*, 61 Md. 139, 142; *Moale v. Baltimore*, 61 Md. 224, 244; *Brown v. Benzinger*, 118 Md. 29, 41; *N. C. Ry. Co. v. Oldenburg et al.*, 122 Md. 236. The demurrer was not good as to the part of the bill seeking relief, as to the part of the lot referred to above, and it was therefore properly overruled.

Ordinarily we would be inclined to pass on the rights of the parties to the hay scales, in order to save further litigation, but the bill is very indefinite as to the right, if any, of the plaintiff to maintain the scales at the point where they are located, and, as we are not required by this demurrer, to pass upon that question, it would not be just to him, or to the city, to attempt to determine the question on a record which is so

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Opinion of the Court.

unsatisfactory as this is. Time and expense might be saved by the defendants filing an answer. The appellants' brief shows that there are a number of facts not mentioned in the bill which their attorney evidently deemed important to have before the Court, for instead of confining the brief to the facts stated in the bill, it contains what purports to be a copy of a part of a map of the city showing the streets in controversy (which is not in the record and is denied by the appellee to be an authorized map), and also a number of alleged facts which do not appear in the record. Such statements in a brief are contrary to the rules and practice of this Court, and of course can not be considered in determining the case, but the fact that they were thus referred to indicates that in the judgment of the solicitor for the appellants the Court could not well have determined the question as to the hay scales on the bill alone. The facts relied on by the defendants could have been presented by filing an answer, and the case could then have been determined on its merits, as suggested in the opinion of the Judge in the lower Court, but inasmuch as that plan was not adopted, we do not feel justified in expressing any opinion as to the rights of the parties in reference to the hay scales, based on what is contained in this record. Of course the sufficiency of the bill for the relief sought as to the hay scales could have been raised by making that a special ground of demurrer. The order of the Court overruling the demurrer must be affirmed and the cause remanded for further proceedings.

Order affirmed and cause remanded for further proceedings, the appellants to pay the costs in this Court, and the costs below to abide the final result of the cause.

JOHN S. GIBBS

vs.

LOUISE N. DIDIER ET AL.

*Leases: liability of mortgagee and assignee after default;
assignment. Ejectment: damages recoverable.*

A suit at law can not be maintained against the assignee of a lease who has assigned over, for rent falling due after the assignment to him and before the assignment by him; the remedy of the lessor in such a case being in equity alone. p. 492

The mortgagee of a term, after forfeiture, has the whole estate therein, and is liable on the real covenants in the lease, whether he becomes possessed of or occupies the premises in fact or not. p. 492

The liability of an assignee of a term to the original lessor, or to those claiming under him, grows out of the privity of estate; and such liability continues only so long as such privity of estate exists. So long as such privity exists, the assignee is liable upon all covenants that run with the land, such as covenants to pay rent and taxes; and for any breach of such covenants the lessor may sue the assignee during the continuance of such assignment. p. 492

An action at law can not be maintained against an assignee of a term, after assignment over, for the breach of any cove-

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Syllabus.

nant running with the land during his holding; the remedy, in such a case, is in equity. p. 492

The mortgagee is regarded as assignee of the term, after default, in a mortgage which contains a condition allowing the mortgagor to remain in possession until default, and as such is liable for the future breach of any of the covenants in the lease that runs with the land, and this without the mortgagee taking possession. 492-493

The mortgagee of a term is not liable under the covenants running with the land for taxes that fall due before a default in the mortgage, when the mortgage contains a condition allowing the mortgagor to remain in possession until default. p. 493

In an ejectment brought by a landlord against a tenant, under the Code, section 73 of Article 75, the landlord may recover possession of the property, the taxes, ground rent and sewerage assessment which fell due, from the time the tenant became assignee of the term, until the date of the filing of the declaration in the ejectment suit, after which time any rent falling due may be considered in fixing the amount of damages. p. 498

In an ejectment between landlord and tenant, under the Code, section 73, Article 75, the service of a copy of the declaration is substituted for the niceties of demand of rent and entry, required at common law. p. 494

In such cases, if the landlord, by service of a declaration in ejectment, elects to determine the lease, he can not, though there has been no judgment in the ejectment suit, sue on covenants subsequently broken. p. 494

The action of ejectment between landlord and tenant does not extinguish the landlord's right to rent and taxes due prior to the time of the filing of the declaration. p. 494

In an action of ejectment between landlord and tenant, under the Code, section 73, Article 75, the form of the declaration is that set out in section 71. pp. 495, 496

In an action of ejectment between landlord and tenant, under

the Code, section 73, Article 75, under the plea of not guilty, the question to be tried is the right of possession and damages.

p. 496

In an ejectment suit between landlord and tenant, under the Code, section 73, Article 75, the landlord may recover possession, mesne profits and damages.

p. 497

The decision of a court upon a claim in a former action is an effectual bar to a recovery in another suit upon the same cause of action as that of a jury, and the fact that the Court's decision was wrong does not give the injured party the right to bring another suit upon the same claim, for he might have appealed and had the error corrected.

p. 499

The law is adverse to multiplying suits; and if a party has the choice between two actions upon the same demand, and he selects one, which is decided by a competent tribunal, either for or against him, as a general rule he will not be permitted to resort to the other.

p. 499

Quære: Can a landlord or lessor institute an action of ejectment and recover the property without claiming, in that suit, rent or other profits he may be entitled to, and then afterwards sue to recover such rent and profit.

p. 499

A landlord who brings an ejectment against a tenant to recover possession of the demised premises and rents and profits, and recovers possession but fails to recover rents and profits, can not bring another suit and recover such rents and profits.

p. 499

A., who owned the reversion in fee in a lot of ground in Baltimore City, with the right to collect a yearly rent of \$500 issuing thereout, brought an ejectment suit under section 73 of Article 75 of the Code against B., the holder of a mortgage in default on the leasehold estate, and in the declaration claimed recovery of the land and \$2,500 damages; the mortgage contained a clause allowing the mortgagor to remain in possession until default. After the ejectment suit, but before verdict, the mortgagee assigned her mortgage to C. At the trial A. offered evidence, which was admitted subject to exception, tending to

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Syllabus.

show that he had paid taxes and a sewer assessment on the demised property and the ground rent due, and offered a prayer instructing the jury that he was entitled to recover such sum; the prayer was rejected, and on the Court's instruction a verdict was rendered for possession of the property, one cent damages and costs, on which judgment was rendered; A. excepted to this action of the Court, but took no appeal. Thereafter, A. brought suit in equity against B., as assignee of the term, to recover the items of taxes, sewer charges and ground rent, which he had attempted to recover but did not recover in the ejectment suit; B. answered, setting up the defense of *res adjudicata*, claiming that the judgment in the ejectment suit for the property named in the declaration—one cent damages and costs—was conclusive, and the lower court so held, passed a decree dismissing the bill, and on appeal it was: *Held*,

1. That as assignee of the term, the appellee was liable for those items of taxes, ground rents and sewer charges. p. 498
2. That they could have been recovered in the ejectment suit. p. 498
3. That if dissatisfied with the rulings in the ejectment suit, A. should have taken an appeal therefrom. p. 499
4. That not having done so, the above items of taxes, ground rent and sewer charges can not be recovered in the above named equity suit. p. 499
5. That under section 73 of Article 75, a landlord can recover in an ejectment suit upon all covenants running with the land, the breach of which occurred before assignment over, and before the filing of the declaration in the ejectment suit. pp. 495, 497
6. That while after the filing of the declaration in the ejectment suit, the rent reserved in the lease can not be recovered *qua* rent, yet in assessing damages it should be considered. p. 498
7. That in an ejectment suit between landlord and tenant, under the Code, Article 75, section 73, mesne profits and damages can be recovered. p. 498

8. The Court refused to discuss the question, whether a landlord can institute an action of ejectment and recover the property without claiming rent and other profits, which he may be entitled to, and thereafter sue to recover such rents and profits. p. 499

Decided April 7th, 1915.

Appeal from Circuit Court No. 2 of Baltimore City.
(AMBLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

Rignal W. Baldwin (with whom was *Richard M. Duvall* on the brief), for the appellant.

Charles F. Stein (with whom was *R. Contee Rose* on the brief), for the appellees.

BOYD, C. J., delivered the opinion of the Court.

On August 20th, 1909, Jacob Goldstein executed a lease to Jackson Q. Force for the term of 99 years of a lot of ground on Madison avenue, in the City of Baltimore, which contained the usual covenants and provisions in such leases, amongst others a covenant by the lessee for himself, his heirs, executors, administrators and assigns, to pay the rent reserved, taxes and assessments when legally demandable. The rent reserved was \$500.00 per annum, payable in equal quarterly instalments on the first days of September, December, March and June. By *mesne* conveyances the reversion became vested in John S. Gibbs (the appellant) and the lease-

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hold in Thomas McGreevy. On February 1st, 1910, McGreevy executed a mortgage to Louise N. Didier (the appellee), for \$1,200.00. The mortgage being in default, proceedings were instituted to foreclose it, and R. Contee Rose was by a decree dated October 3, 1912, appointed trustee to sell the property. The trustee sold it on October 29th, 1912, to the appellee, but the sale was set aside on exceptions filed by her.

On October 17th, 1913, the appellant instituted an action of ejectment against Louise N. Didier, Evan W. Hood and Jackson Q. Force—the latter being the original lessee and Mr. Hood being the assignee of the lease, subject to the mortgage. On April 3rd, 1914, there was a verdict in favor of the plaintiff for the property and one cent damages and costs. The plaintiff filed a motion for a new trial, which was subsequently dismissed, and judgment was made absolute on May 22nd, 1914, against the appellee. On March 21st, 1914, the appellee conveyed to R. Victor Hedian all her interest in the mortgage, together with her interest and estate in the property.

The appellant filed a bill in equity against the appellee (Louise N. Didier) and R. Contee Rose, trustee, to compel them to pay the ground rent alleged to be due him and money expended by him for taxes and sewerage charges levied against the property. The lower Court sustained a demurrer filed by R. Contee Rose, and dismissed the bill as to him, and the case then proceeded against Louise N. Didier, resulting in a decree in her favor, from which this appeal was taken. In her answer she relied on the defense of *res adjudicata*, claiming that the judgment for the plaintiff for the property mentioned in the declaration and one cent damages in the ejectment case was conclusive. The decree recites that "The Court being of opinion that all the matters in issue in this cause were in issue, and were settled and determined in the action of ejectment between the same parties of which the

record was offered in evidence in this proceeding," etc. That was the main question argued before us.

It may be helpful to us to recall some of the decisions of this Court in reference to the liability of the assignee of a lease on the covenants contained therein. In *Hintze v. Thomas*, 7 Md. 346, it was held that "A suit *at law* can not be maintained against the assignee of a lessee *after* he has assigned over for rent falling due subsequent to the assignment to him, and before the assignment over, the remedy of the lessor in such case being in equity alone." That was followed by *Mayhew v. Hardesty*, 8 Md. 479, where it was held that "The mortgagee of a term, *after forfeiture*, has the whole estate therein, and is liable on the *real covenants* in the lease whether he becomes possessed of or occupies the premises *in fact* or not." In *Donelson v. Polk*, 64 Md. 501, it was said: "The principle of law is a familiar one, that the liability of an *assignee* of a term to the original lessor, or those claiming under him, grows out of the privity of estate, and that such liability continues only so long as such privity of estate exists. So long as the privity of estate continues, the assignee is liable upon all covenants that *run with the land*, such as covenants for the payment of rent, and of taxes assessed upon the premises (*Lester v. Hardesty*, 29 Md. 50), and for any breach of such covenants the lessor may sue him during the continuance of the assignment." JUDGE ALVEY, after reviewing some cases, and intimating that but for the decision in *Hintze v. Thomas* the Court might have held otherwise, held that such action *at law* could not be maintained after assignment for breaches of covenant committed by the assignee during the time of his holding, but the remedy was *in equity*.

Other cases might be cited to the same effect, but while the rule is well established that *after forfeiture* a mortgagee is regarded as the assignee of the term, and hence is liable on the real covenants, there is danger of great hardship being imposed on a mortgagee, and the right to hold one liable on

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such covenants should be very thoroughly established before recovery is permitted—especially should this be so in a court of equity. No more striking illustration of the possible hardship of the rule need be given than this case. The appellant has by the ejectment proceedings not only deprived the appellee of the security she presumably supposed she had when she took the mortgage, but now seeks to hold her liable for about \$2,000.00, which the mortgagor ought to have paid, merely because she held the mortgage on the leasehold interest, although she was not in actual possession of the property. That a party can have any standing in a court of equity to make such claim is suggestive of the desirability of having some legislation on the subject.

Before coming to the question of *res adjudicata* it will be well to pass on some of the items sought to be recovered. There is nothing to show a default in the mortgage until the taxes for 1910 were "legally payable" (to use the language of the mortgage), and therefore the appellee could not be held for the taxes for that year, as there must have been such default in the mortgage as vested the term in her before she could be liable. Without quoting them, we will only say that the terms of the mortgage were such as to leave the title to the leasehold in the mortgagor until default.

The appellant contends that the ejectment proceeding referred to was under section 73, and not under section 71, of Article 75 of the Code, and he argues that he therefore could not have recovered in that proceeding the taxes, rent and sewerage charge now sought to be recovered. If that be conceded, *ex gratia argumenti*, it would seem to be clear that the appellant can not recover the quarterly instalments of rent due December 1st, 1913, and March 1st, 1914.

The lease contained a provision that if the rent should be in arrear, in whole or in part, for sixty days, it should be lawful for said Jacob Goldstein, his heirs or assigns, to re-enter upon the demised premises and hold the same until all the arrearages of rent and expenses incurred by reason of

such non-payment should be fully paid. "And provided further that if said rent shall be in arrear for six months, then the said Jacob Goldstein, his heirs or assigns, may re-enter upon the premises hereby demised and hold the same as if this lease had never been made." Section 73 of Article 75, which is in substance the same as section 2 of 4 Geo. 2, Ch. 28, which was in force in this State, provides that between landlord and tenant when there is one-half year's rent in arrear and the landlord or lessor hath the right by law to re-enter for the non-payment thereof, "such landlord or lessor shall and may, without any formal demand or re-entry, serve a copy of a *declaration in ejectment* for the recovery of the demised premises," etc. "The service of the declaration in ejectment is substituted for the niceties of demand of rent and entry required at common law," 2 Alex. Br. Stat. 958, or as stated in *Campbell v. Shipley*, 41 Md. 94, the statute "dispenses with a previous demand of rent and re-entry, and substitutes therefor service of a copy of the declaration in ejectment in all cases where the landlord or lessor has right by law to re-enter." It is also stated in 2 Alex. Br. Stat. 962, that "The landlord by service of a declaration in ejectment makes his election to determine the lease and can not, though there has been no judgment in the ejectment, sue for rent due or covenants subsequently broken. *Jones v. Carter*, 15 M. & W. 718." Understanding it to mean that he can not sue for rent subsequently due, that is, in our judgment, a correct statement of the law, and hence the rent falling due subsequent to the filing of the declaration can not be recovered, *qua* rent. As the record does not satisfactorily show when the taxes for 1913 were due and payable, we can not say whether they could be recovered. We will only add on this branch of the case that under the decision in *Mackubin v. Whelcroft*, 4 H. & McH. 135, the right to rent and taxes due prior to the time of the filing of the declaration is not extinguished by an action of ejectment.

But as there are still some items in the appellants' claim which are not affected by what we have said, we must deter-

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mine whether the ejectment suit was a bar to the recovery of the rent, taxes, etc., which might have been recovered in that suit. We can not agree with the appellant in the contention that that must necessarily depend upon whether the ejectment was brought under section 71 or section 73 of Article 75, but assuming that it was brought under section 73, we will first see whether the items sued for could have been then recovered, if they had been shown to be due.

Section 73 does not provide for what shall be included in the declaration, but it only says "such landlord or lessor shall and may, without any formal demand or re-entry, serve a copy of a *declaration in ejectment* for the recovery of the demised premises; or in case the same can not be legally served"—it then makes provision for that contingency. That section is under the sub-title of "Ejectment," in Article 75, and in order to ascertain what is necessary in a declaration in ejectment we must look to section 71, as that is the only one which directs what shall be included in such a declaration. It says: "The action of ejectment shall be commenced by filing a declaration in which the real claimant shall be named as plaintiff and the tenant in possession or the party claiming adversely to the plaintiff shall be defendant; it shall be sufficient to state in the declaration that the plaintiff was in possession of the land or premises described in the declaration, and that the defendant ejected him therefrom and retains possession thereof, and the amount of damages claimed by the plaintiff." It then provides for service of the process and for the defendant, or for any other person with leave of Court, appearing and filing the plea of not guilty, "which plea shall be held a confession of the possession and ejectment, and shall only put in issue the title to the premises and right of possession and the amount of damages claimed by the plaintiff." It further provides that "the plaintiff shall also recover as damages in this action the *mesne* profits and damages sustained by him and caused by the ejectment and detention of the premises up to the time of the determination of the case." The declaration filed in the ejectment case referred

to in these proceedings was in exact compliance with the requirements of section 71, and in it the plaintiff claimed the recovery of the land and \$2,500.00 damages. Inasmuch as section 73 makes no provision for any other kind of declaration, it was proper to follow section 71 in that respect, and it is difficult to understand why it should not be done. Section 73 provides that in case of judgment against the defendant, the lessee or his assignee, or other person claiming or deriving under the said lease, in order to redeem the property the rent and arrears shall be paid as therein provided, and that section concludes by saying that nothing therein contained shall bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, if such mortgagee "within six calendar months after such judgment obtained and execution executed, pay all costs *and damages* sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee are and ought to be performed." There is nothing in that section to suggest that all damages which the plaintiff has sustained can not be recovered in the ejectment suit. In 2 *Poe on Pl. & Pr.*, sec. 482, it is said, in referring to ejectment under section 73, "The practice in these cases, as authorized originally by the Statute of 4 George 2, Chapter 28, section 2, which is substantially re-enacted in our Code, does not differ from that in the ordinary action of ejectment, so far as the declaration and plea are concerned." That learned author then went on to show that although there was no actual eviction of the landlord by the tenant in such cases, yet the non-payment of rent according to the covenant of the lease and the continued holding of the tenant after its breach are, in contemplation of law, an eviction which gives to the landlord a right of action without a previous demand for the rent due, and justifies the averment that the tenant has ejected him. Then in section 485 of that volume, it is said, in speaking of the plea to be filed in ejectment by the landlord against the tenant, "This is the

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usual general issue plea of 'not guilty,' and its effect is precisely the same as in the ordinary action of ejectment—that is to say, it admits the possession by the plaintiff and his ejectment by the defendant, and puts in issue the title and right of possession to the premises *and the damages*. As, however, in this class of cases the defendant, as tenant, is estopped to deny his landlord's title, the question to be tried is simply the plaintiff's right of possession *and his damages*." In the absence of some provision in section 73, limiting the recovery to the possession of the property, we can see no reason why damages can not be recovered, as they can be in an ejectment brought under section 71. If one entitled to redeem within the six months provided for in the statute desires to take advantage of that right, it would often relieve the parties of controversies as to the amount necessary, by having a judgment for the damages. Indeed the provision for a mortgagee redeeming would not be the protection for him without such judgment, as it would be with it, as the amount would then be judicially determined—he is required to "pay all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid."

The Act of 1872, Chapter 346, made a radical change in this State in ejectment proceedings. Prior to that only nominal damages were allowed in such cases, and if the plaintiff desired to recover *mesne* profits and substantial damages, another action was necessary. What is now section 73 of Article 75 was section 2 of the Act of 1872, Chapter 346, and inasmuch as the first section of that Act amended the law so as to authorize the recovery of *mesne* profits and damages in ejectment cases, there can be no reason why it should not be held to apply to section 73. The right to recover *mesne* profits and damages in a case brought under section 73 can not be denied on the ground that only nominal damages were recoverable under 4 George 2, Chapter 28, if that be conceded. The question here is whether when the Act of 1872 was passed it was intended to limit the right to recover *mesne* profits and substantial damages to ejectment

suits other than those between landlord and tenant, notwithstanding what we have pointed out as to the form of the declaration, etc. As we can see no valid reason for so limiting the statute, we hold that the provision as to damages is applicable to section 73 as well as to section 71, as stated by Mr. Poe. Of course, the damages that may be recovered under section 73 may differ from those that are recoverable under section 71 by reason of provisions in the lease or other reason.

It is proper to add that although we have said above that the plaintiff in an ejectment case of this kind can not recover rent falling due after the declaration is filed, because the plaintiff has made his election to determine the lease, yet if by the defendant's defense the plaintiff is delayed in recovering the property, there can be no reason why he should not recover damages for the detention of the premises up to the time of the determination of the case, in accordance with the provisions of section 71, and while rent becoming due after the declaration is filed can not be recovered *as rent*, it can in proper cases be considered in fixing the amount of damages.

Being of the opinion that the Court had the right to determine in the ejectment case the claims of the plaintiff for the taxes, ground rent and sewerage assessment, which are now sought to be recovered, and being satisfied from the record that they were attempted to be recovered in that case, it would seem clear that the appellant can not now recover them in this case. The plaintiff claimed \$2,500.00 damages in his *narr.* in the ejectment case, evidence was admitted of the ground rent due, the taxes and the bill for sewerage connection paid by the plaintiff, and prayers were offered by him as to his right to recover all of these items. His second and third prayers, as printed in the record, conclude as to his right to recover the ground-rent, but as that was covered by the first prayer and the second refers to taxes and the third to the sewerage charges apparently there was an error, either in writing the conclusion of the prayers or in the

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record, but the fourth refers to the ground-rent, the taxes and the sewerage charge. It is true that certain evidence admitted subject to exception was stricken out and the prayers of the plaintiff were refused, but if there was error in the Court's ruling it should have been corrected by appeal. In *Beall v. Pearre*, 12 Md. 550, it was said (quoting from syllabus): "The decision of a Court upon a claim in a former action is as effectual a bar to a recovery in another suit, upon the same cause of action, as that of a jury; and the fact that the Court's decision was *wrong* does not give the injured party the right to bring another suit upon the same claim, for he might have *appealed* and had the error corrected." See also *Thomas v. Malster*, 14 Md. 382; *State, use Bruner, v. Ramsburg*, 43 Md. 325.

"The law is adverse to multiplying suits; and if a party has a choice between two actions upon the same demand, and he selects one, which is decided by a competent tribunal, either for or against him, as a general rule, he will not be permitted to resort to the other." *Walsh & McKaig v. C. & O. Canal Co.*, 59 Md. 423.

Without deeming it necessary to discuss the question whether a landlord or lessor can now institute an action of ejectment and recover the property, without claiming in that suit rent or other profits he may be entitled to, and then afterwards sue to recover such rent and profits, we have no hesitation in holding that he can not claim them in the ejectment suit, and, upon failure to recover them, afterwards sue for them as was done by this appellant. Without further discussing the subject, we will affirm the decree dismissing the bill.

Decree affirmed, the appellant to pay the costs.

JACOB FRIED ET AL., SURVIVING PARTNERS, ETC.,

vs.

SELMA R. BURK, EXECUTRIX, ETC.

Partners and partnerships: surviving partners; accounting with personal representatives of deceased partner. Pleading in equity: multifariousness.

The surviving partners of a firm can not deprive the executor or administrator of a deceased partner of the right to a full and accurate accounting. p. 506

The relations of surviving partners and the personal representatives of a deceased partner are those of *quasi* trustees and *cestui que trustent*. p. 507

A bill filed against the surviving partners for an accounting by the executors of a deceased partner prayed that the defendants might be required to answer under oath, etc., that the complainant might have the books examined, etc., that the defendants might be required to account to the complainant for the interest of the deceased partner in the partnership property to the time of his death; that the money collected on a certain policy of life insurance that had been made payable to the firm, and had been collected by them, might be declared partnership assets, and that a certain agreement between the defendants as to the division of the assets, be declared void,

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and for general relief: *Held*, that the bill was not multifarious. p. 510

A bill in equity is bad for multifariousness when it embraces different persons as complainants or defendants, who have no privity with each other, or where the same person is complainant in different capacities, or where the defendant is made defendant in regard to several distinct matters having no connection with each other. p. 509

Decided April 7th, 1915.

Appeal from Circuit Court No. 2 of Baltimore City.
(AMBLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

William B. Bamberger, for the appellant.

Roger T. Gill and Edward M. Hammond, for the appellee.

THOMAS, J., delivered the opinion of the Court.

Charles Burk, of Baltimore City, a member of the firm of Burk, Fried and Company, died on the 17th of October, 1913, leaving a last will and testament which was duly admitted to probate in the Orphans' Court of Baltimore City in March, 1914, and letters testamentary were granted to his widow, the executrix therein named. By the terms of the will all of the testator's estate remaining after a devise to his widow and the payment of certain legacies to her and others, is bequeathed and devised to her, in trust to hold and manage the same for a period not exceeding five years, so as to enable her to gradually withdraw from the firm of Burk, Fried and Company such part of his estate "as may be invested therein as capital without embarrassing or hindering the operations

of the business of the said firm," and to sell the real and leasehold property belonging to his estate without forcing the same upon the market.

On the 20th of July, 1914, the executrix filed a bill of complaint in Circuit Court No. 2 of Baltimore City against Jacob Fried, Joseph Fensterwald and Julius B. Fensterwald, the surviving partners of said firm, in which it is alleged that the deceased and the defendants were for a number of years "co-partners in the business of manufacturing clothes" at the southwest corner of Baltimore street and Market Space, in Baltimore City, and that each of said partners were supposed to have an equal interest in the business; that upon the death of Charles Burk the plaintiff employed William B. Bamberger, Esq., a member of the Baltimore Bar, and also the bookkeeper of said firm, to represent her in the management of her trust, and that while so employed he prepared for her and had her file in the Orphans' Court a list of debts in which the firm is charged with being indebted to Charles Burk's estate in the sum of \$66,138.79, which debt, she is now informed, is supposed to represent the entire interest of the testator in the partnership of Burk, Fried and Company, as follows:

"Capital account	\$56,874.52
"Loan account	22,500.00
	<hr/>
	\$79,374.52

CREDITS.

"1/8 Inventory of Dallas store.....	\$ 9,117.92	
"1/16 Inventory of Memphis, Tenn., store	2,195.12	
"Charles Burk's withdrawals, 1913.	1,922.69	
	<hr/>	
	\$13,235.73	\$13,235.73
		<hr/>
		\$66,138.79;"

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that the above account was prepared by William B. Bamberger from the books of Burk, Fried and Company, "supposedly in the interest of your oratrix, while he was in the employ and subject to the control and direction of the surviving members of" the firm; that the plaintiff has no knowledge as to its accuracy, and that the defendants have refused to allow her to examine the books of the firm for the purpose of ascertaining their condition, but that from the information since received by her she charges and alleges that the same is not "a true statement of the interest and account" of the testator in the partnership.

The bill further alleges that the defendants in their alleged statement of the interest of the testator in the partnership estate have valued some of the assets of the firm far below their market value, claiming that the same is in accordance with the books of the firm; that they have valued the property at the corner of Baltimore street and Market Space, the cost price of which was in excess of \$145,000, at \$100,000.00; the property No. 748 Lombard street, the cost price of which exceeded \$13,000, at \$6,000, and the property No. 8 Market Space, which cost more than \$2,000, at \$1,441.65, and that they have valued the stock, fixtures, etc., without reference to their market value, as appears by a copy of their statement filed with the bill as "Exhibit No. 3." It is also averred that in the statement referred to the interest of the testator in the firm assets is not credited with any part of the undivided profits of the firm, amounting to \$53,769.85, or any part of the profits for the year 1913; that the plaintiff is entitled to have the statement of payments made to the testator in the year 1913, amounting to \$1,922.69, and the item in the statement designated "Goods Account," amounting to \$639.03, verified; that the defendants have collected from the New York Mutual Life Insurance Company, on a policy of insurance on the life of the deceased, payable to the firm, the sum of \$15,000 (to which no reference is made in the statement), and that as the cost of the policy was paid

by the firm, and the policy was one of the assets of the firm, the estate of the deceased is entitled to one-fourth of the amount collected thereon.

The bill further alleges that the testator in his will, a copy of which is filed with the bill, directs his executrix in settling with the surviving partners of Burk, Fried and Company to accept as the value of his interest in the business of the firm the valuation thereof as shown by the last inventory "regularly taken and made by the said firm prior to his death"; that said provision of the will "is not mandatory but directory * * * but if the Court should decide that the same is mandatory then" the plaintiff "is entitled to examine and verify such last inventory, all of which has been denied her." It also avers that the deceased and the defendants, on the 2nd of May, 1913, "attempted to enter into an agreement," a copy of which is exhibited with the bill, in which, after reciting that the firm of Burk and Company, of Dallas, Texas, was, on January 1st, 1913, indebted to them in the sum of \$72,943.41, and that the firm of Burk and Company, of Memphis, Tenn., was indebted to them, on the 1st of January, 1913, in the sum of \$35,121.80; that they had from time to time set aside from their profits sums designated in their books as "Undivided profits," amounting, on January 1st, 1913, to \$53,769.80, for the purpose of meeting any loss that might accrue from said accounts of the two firms referred to and to keep their capital account intact, they agreed that in the event of the death of either of them during the year 1913 * * * such undivided profits should become the property of the surviving partners of Burk, Fried and Company, who, in accounting to the executor of the deceased partner, should consider the account of Burk and Company, of Dallas, Texas, as worth fifty per cent. of the amount due January 1st, 1913, that is to say, \$36,471.70, and the account of Burk and Company, of Memphis, Tenn., as worth seventy-five per cent. of the amount due January 1st, 1913, or \$26,341.35, and that to these amounts all charges after January 1st,

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1913, should be added, and all credits after that date should be deducted in ascertaining the amounts for which the surviving partners must account to the estate of the deceased partner on account of said claims. That agreement, the plaintiff charges, is void for want of consideration, and she further charges that if it is not void, then its "true meaning" is that the accounts therein mentioned are to be paid out of the undivided profits, whereas the defendants, in fixing the value of the testator's interest in the partnership estate, have claimed the whole of the undivided profits and charged the interest of the testator "with its proportionate part of the supposed loss from" said accounts.

In conclusion the bill avers that for the purpose of ascertaining the interest of the deceased in the partnership she is entitled to have "the books, papers and assets of" the firm examined by an accountant, and that the facts of which discovery is sought "are indispensable as proof to the plaintiff, and that she is unable to prove them except by the answer of the defendants."

The bill then prays (1) that the defendants "may be required to answer under oath and set out in detail and discover all property of every kind, real and personal, where-soever situated, belonging to the firm of Burk, Fried and Company * * * on October 17th, 1913, the date of the death of Charles Burk;" (2) that the plaintiff may have "the books, papers and assets of said firm * * * examined by an accountant under the supervision" of the Court; (3) that the defendants may be required to account to the plaintiff for the interest of Charles Burk in the partnership property to October 17th, 1913; (4) that the money collected on said policy of insurance "be declared to be partnership assets;" (5) that the alleged agreement between the partners be declared void, and (6) for general relief.

The defendants demurred to the bill "and each paragraph thereof" upon the ground, first, that the plaintiff has not stated in the bill "such a case as entitles her to any relief

in equity against the defendants or any of them;" second, that "there is a want of certainty in the bill," and, third, that "it appears by the bill that the same is exhibited against these defendants for several and distinct matters and causes, and that the bill is multifarious." The Court below overruled the demurrer, with leave to the defendants to answer, and this appeal is from that order.

The obvious purpose of the bill is to secure from the defendants an accurate accounting of the partnership estate, and to require them, as surviving partners, to make discovery of the property and assets of the firm. The averments are, in substance, that Charles Burk was at the time of his death a member of the firm of Burk, Fried & Co., of which the defendants are the surviving partners; that the deceased left a last will and testament, and that letters testamentary have been granted to the plaintiff; that the defendants have submitted to her a statement of the partnership estate in which the interest of the deceased is represented to be \$66,138.73; that the statement so submitted to her is not a true account of the property and assets of the firm or a correct statement of the interest of the deceased therein; that the defendants have in said statement valued the partnership property far below its market value and without regard to its real value, and have refused to permit the plaintiff to examine the books of the firm for the purpose of verifying the account rendered her or ascertaining the items and amount of the estate. These averments are admitted by the demurrer, and to hold that they do not present a case for equitable interposition and relief would in effect constitute the surviving partners of a firm the sole arbiters of a deceased partner's interest in the partnership estate, and deprive his executor or administrator of the right to exact from them a full and accurate accounting. Such a doctrine is not supported by either principle or authority. That the relation of surviving partners and the personal representative of a deceased partner is that of *quasi trustees* and *cestui que trust*, has been fully

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recognized in this State. It is the right and duty of the former to administer the partnership property and to account to the latter for the deceased partner's interest, and the jurisdiction of courts of equity to enforce that duty, does not rest merely upon the doctrine concerning accounting, but upon the principles applicable to the administration of trusts. *Glenn v. Hebb*, 12 G. & J. 271; *Walker et al. v. House*, 4 Md. Ch. 39; *Smith v. Townshend*, 27 Md. 368; *McKaig v. Hebb*, 42 Md. 227; *Welbourn v. Kleinle*, 92 Md. 114; *Miller's Pro.*, sec. 721; *Denver v. Roane*, 99 U. S. 355; *Pomeroy's Equity Jurisprudence* (2nd Ed.), secs. 1063, 1088, 1421; *Parsons on Partnership* (3rd Ed.), pp. 441-442, 508-509; *Bates on Partnership*, secs. 715, 739, 740; 30 *Cyc.*, 621, 684, 712.

In *Welbourn v. Kleinle*, *supra*, where the bill was filed to compel the surviving partner to account for the partnership assets at their true value, JUDGE PEARCE quotes the statement in *Parsons on Contracts*, 441-2, that "Surviving partners are held strictly as trustees, and their conduct in discharging their trust is carefully looked after by courts of equity," and says, "The law is stated in similar language in *Bates on Partnership*, sec. 743, and in *Perry on Trusts*, Vol. 1, sec. 178. Whether it is technically accurate to designate them trustees is not material, since there is a general concurrence among text writers, and in the decided cases, that they are trustees in a certain sense, and that they sustain a fiduciary relation to the representatives of the deceased partner." After referring to the well-established rule of perfect fairness and good faith applicable to dealings between a trustee and his *cestui que trust*, and applying it to the facts of that case, where the surviving partner had purchased a deceased partner's interest in the partnership estate from his executrix, he said further: "In the leading case of *Ogden v. Astor*, 4 Sandfords S. C. 350, 334, 335, it is said: 'It is incumbent on surviving partners to give to the administrator of the deceased partner a full statement of all the property of the joint con-

cern;' and 'to make all the disclosures necessary to enable the administrator to form a correct judgment as to the condition of the partnership affairs' 'or which in the mind of a prudent person would be likely to affect the question of the account.' And in *Perry on Trusts*, Vol. 1, sec. 178 (4th Ed.), it is said: 'If a partner who keeps the accounts of the firm should purchase his co-partner's interest without disclosing the state of the accounts, the agreement could not stand.' "

Surviving partners have no right to take the partnership property at their own valuation, *Walker v. House, supra*, and it is said in *Smith v. Townshend, supra*: "The bill also prays for an account; and *cestui que trust* have at all times the right to call a trustee into equity for the purpose of having an account of the trust property." See also *Bruns v. Spalding*, 90 Md. 349.

In *Denver v. Roane, supra*, the Supreme Court said: "That a bill in equity may be maintained by the personal representatives of a deceased partner against the survivors to compel an account, so far as an account is possible, and for a discovery of the partnership property which came into their hands, is undeniable, and such was the object of the present bill." And in 2 *Lindley on Partnership* (2 Am. Ed.), star p. 501, it is said: "The right of every partner to a discovery from his co-partner of all matters relating to the partnership dealings and transactions is as incontestable as his right to an account; and such right, like the right to an account, devolves upon, and is enforceable against, a partner's legal personal representatives and trustees in bankruptcy."

The fact that the bill seeks also to have the agreement of the 2nd of May, 1913, declared void, and the proceeds of the policy of life insurance adjudged to be a part of the assets of the partnership estate does not render it multifarious. It is said in *Miller v. Balto. County Marble Co.*, 52 Md. 642: "It will be found upon an examination of the many cases in which this subject has been considered, that the objection to bills in equity on the ground of *multifarious-*

Md.]

Opinion of the Court.

ness, is confined to three classes: 1st. Where the bill embraces different persons as plaintiffs or defendants, who have no privity with each other, as in *Exeter College v. Rowlan*, 6 Madd. 94, and *Attorney-General v. Merchants Tailors Co.*, 1 M. & K. 189; 2nd. Where the same party sues or is sued in different capacities, as in *Ward v. Duke of Northumberland*, 2 Anst. 469, and 3rd. Where the defendant is sued in regard to several distinct matters, which have no connection with each other, as in *Attorney-General v. Goldsmith*, 5 Sim. 675. Now it is very clear, the bill before us does not come within either of these classes. It is simply a bill by a creditor and shareholder, alleging the insolvency of the corporation, and praying that the shareholders may be assessed ratably for the payment of the debts of the company. It is true, that in addition to the prayer for general relief, the complainant seeks to restrain the execution of a judgment, which he alleges was fraudulently recovered against the corporation. But all the parties have a common interest in the subject-matters embraced in the bill—a common interest in ascertaining the liabilities of the company, including the Fickey judgment, and the amount which each shareholder is liable for contribution on account of said indebtedness. In no sense then can the bill be said to be *multifarious*.” In the recent case of *Roth v. Stuerken*, ante, p. 404, JUDGE CONSTABLE, in disposing of the demurrer to the bill on the ground of multifariousness, said: “Can the defendants contend that they are not concerned with, and have no interest in, the outcome of the cause of action each against the other? The entire question to be determined is whether or not the agreement, entered into by all the parties, has been broken and violated by the two defendants, one in one manner and the other in another. The injury alleged arose out of the same transaction and over the same subject-matter. If the defendant, Roth, is liable, the defendant, Hertel, is interested to the extent of his proportion of the profits, and

if both are liable then are both interested to the extent of their respective shares."

In the case at bar all the surviving partners were necessary parties; the several matters referred to in the bill relate to the partnership estate in which they have a common interest, and a proper accounting cannot be had without a determination of the effect of the agreement and the title of the parties to the policy of insurance. The several matters presented are, therefor, not only not distinct and disconnected, but are inseparably connected and necessarily involved in a proper settlement of the partnership estate.

We have examined the cases cited by the appellant. Many of them relate to questions that may arise in the further progress of the case, but which are not presented by the demurrer. We are not now concerned with the effect of any account that may have been stated by the partners prior to the testator's death, but are here considering the right of the plaintiff, upon the allegations of the bill, to an accounting and discovery and an adjudication of the validity of the agreement and the interest of the parties in the proceeds of the policy. The authorities relied upon by the appellant, when applied to the material averments, are not in conflict with those to which we have referred.

The bill being free from any of the objections raised by the demurrer, the order of the Court below will be affirmed.

Order affirmed and case remanded, the costs to be paid by the appellants.

Md.]

Syllabus.

WALTER S. GALLOWAY

vs.

JEANNETTE N. GALLOWAY.

Divorce: setting aside decree after enrollment; rule for—.

While influenced by threats of her husband, and under his control, a wife signed a letter, which had been read to her only in part, and which was a letter addressed to an attorney authorizing him to appear for her in divorce proceedings, to be instituted by the husband; it had not been disclosed to her what was to be the ground on which the divorce was to be sought for, nor had it been disclosed to her that the attorney's duties were restricted to the filing of an answer, or that he was not to appear for her at the taking of the testimony; the decree was passed on March 10th, and the petition for its annulment filed on July 28th following; it was not shown that before the filing of the petition the status or position of the husband, as a result of the decree, had been in anywise changed; a demurrer to her petition to have the decree of divorce stricken out having been overruled, on appeal it was: *Held*, that upon all the facts of the case, although the decree had been enrolled, the overruling of the demurrer was correct.

p. 517

In general, after enrollment, a decree or decretal order, can be revised only by a bill of review or original bill, and not by petition, excepting where the case was not heard upon its merits, where the circumstances are such that the Court is satisfied that the decree ought to be set aside, or where the decree was entered by mistake or surprise.

p. 516

Decided April 7th, 1915.

Appeal from Circuit Court No. 2 of Baltimore City.
(AMBLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Howard Bryant and Harry N. Abercrombie, for the appellant.

Henry J. Broening, for the appellee.

PATTISON, J., delivered the opinion of the Court.

In this case the appellee, on the 28th day of July, 1914, filed her petition against the appellant asking that a decree divorcing her from him, granted on the 10th day of March, 1914, be annulled and set aside and that she be permitted to further answer and take testimony on her behalf upon the issues joined. A demurrer to the petition was filed which was overruled. It is from the order of Court overruling the demurrer that this appeal is taken, and therefore it will be necessary for us to state fully the facts alleged in the petition.

The petition alleges that the appellant filed his bill for said divorce on the 24th day of January, 1914. The appellant at such time was living separate and apart from the appellee, because, as he had stated, "their living together was not conducive to his happiness and he felt hampered in his movements." The separation, which occurred October 7th, 1912, left the appellee without any means of support, and it was through the intercession of her counsel, William A. Wheatley, Esq., an attorney of the Baltimore Bar, that she received from the appellant the sum of seventy-five dol-

Md.]

Opinion of the Court.

lars a month, which was paid to her to the first day of March, 1914, when such payments ceased.

That the appellant, who was an employee of the Baltimore & Ohio Railroad Company at a salary in excess of five thousand dollars a year, on several occasions prior to the filing of his bill, invited the appellee to his office in the company's building on the corner of Charles and Baltimore streets, requesting her to come alone, and when she asked permission to bring her sister with her, it was refused. On the first of these occasions he said to her "I want to be a free man now that we are not living together" and that he wished a divorce; that he would never live with her again and charged her with wrongdoing with a neighbor's boy by the name of Morris Hay, who was a frequent visitor at their home and a constant companion of her husband on his launch; that she replied, saying "Jack, you know you don't believe that in your heart," to which he made no reply, and she gave it little thought, and had it not been for the seriousness of the charge she would have treated it as a joke.

That on the next visit to his office, shortly before the date of the filing of his bill, he again spoke of divorce proceedings, and his purpose and object appeared to be to secure a promise that she would not resist him in obtaining it. He said "I don't want you to fight against it," and if she did he would resign his position, leave town and throw her upon her own resources, well knowing her helpless condition; that she at such time was without property or means of support; that at the time of her marriage she held a half interest in a farm in Anne Arundel County, but this was sacrificed in the sale of it at and for the sum of five hundred dollars, which was loaned to him and for which he gave to her his note, which has never been paid.

The petition further alleges that he, in one of these interviews with her, said he could obtain a "divorce in privacy" if his course was followed; that he would, in lieu of alimony, pay her the "lump sum" of three thousand five hundred dollars, and to this end he drew up a paper, the wording of

which she cannot recall, and persuaded her to sign it, she at the time being completely unnerved and being absolutely under his influence and control. He also signed it and, after placing it in an envelope, gave it to Mr. Jones, a clerk, who was called from an adjoining room. Mr. Jones was told to keep the same until it would be called for by the appellant, and something was said by the latter to Mr. Jones about a divorce, but in her nervous condition she did not understand what it was. That she was told in this interview that under no circumstances should she seek the aid or advice of an attorney, and with some feeling he especially forbade her to see Mr. Wheatley, who had previously aided her in obtaining the monthly payments of seventy-five dollars hereinbefore mentioned, and told her that he would select an attorney for her who would properly look after her interest and upon whom she could rely and would see that justice was done her. At this stage of the interview the appellant, sitting at his desk in his office, wrote a letter which he gave to Mr. Bowers, who had been called from an adjoining room, and directed Bowers to typewrite it and return it to him; this he did and the appellant persuaded her to sign it. After it was signed she requested that she be permitted to take the letter with her, saying she would mail it, to which he replied, "No, I will mail it myself." That she did not read the letter, it was read to her, or at least a part of it, she was not able to say that the whole of it was read to her; that the person to whom it was addressed was to represent her in the proceedings. That she did not see this letter again until it was produced by William N. McFaul, Esq., the attorney to whom it was addressed, in the office of her attorney, Mr. Broening. Mr. McFaul, whom she had never met, had come to Mr. Broening's office in response to an inquiry from him as to why he had not appeared for and on behalf of the petitioner at the taking of the testimony in the case. Mr. McFaul produced the letter to explain why he had not done so; the reason, as disclosed by the letter, being that he was directed to "file an answer, as he had done, and nothing more." The fact that

Md.]

Opinion of the Court.

Mr. McFaul was restricted in the duties that he was to perform was, as she expressed it in her petition, news to her.

The petition further alleges that she was never called upon as a witness, nor was she present at the taking of any of the testimony, and "her absolute ignorance of the law made her an easy dupe of the nefarious scheme of her husband. That had she known that the price of the severance of the marital ties * * * was the bartering away of her virtue she certainly would have been present, in person or by counsel, to protect herself from the stigma heaped upon her and to which, as the proceedings now stand, she seemingly was a willing party."

The petition further alleges that in March, after the passage of the decree, the petitioner, in response to a 'phone call from the appellant, went to his office, and on which occasion Mr. Jones, the party in whose custody the aforesaid paper signed by both the appellant and appellee had been entrusted and by which he was to pay the petitioner, in lieu of alimony, thirty-five hundred dollars, was requested to produce such paper, and when it was delivered to the appellant he placed it in a drawer of his desk and then turned to the petitioner and said, "I am not going to give you any money, I have now got my divorce." She then left the office and, after conferring with friends, employed her present attorney, Henry J. Broening, Esq., who, upon examination of the divorce proceedings, discovered from them and disclosed to her that the ground upon which the divorce had been granted was that of adultery, which disclosure, as it is alleged, was a surprise to the petitioner.

The grounds of the demurrer, as disclosed by the record, are: 1. A want of jurisdiction in the Court to grant the relief asked for in the petition; 2. That the petition alleges no facts from which surprise or mistake may be inferred as a result of the passage of the decree; 3. That the facts alleged by the petition are not such as to satisfy the Court, in the exercise of a sound discretion, that the enrolled decree should be annulled and set aside; 4. Laches on the part of the defendant.

In the recent case of *Whitlock Cordage Co. v. Hine et al.*, ante, page 96, in which the opinion was delivered by CHIEF JUSTICE BOYD, this Court went very fully into the law as it exists in this State in relation to the rescission or annulment of enrolled orders or decrees, and when the proceedings in such cases should be by bill of review or original bill for fraud and when by petition, and, therefore, we do not feel called upon at this time to do more than refer generally to such opinion and the authorities therein cited. *Oliver v. Palmer*, 11 G. & J. 136; *Herbert v. Rowles*, 30 Md. 271; *First National Bank v. Eccleston*, 48 Md. 145; *Gechter v. Gechter*, 51 Md. 187; *Patterson v. Preston*, 51 Md. 190; *Straus v. Rost*, 67 Md. 465; *Mallery v. Quinn*, 88 Md. 38; *Primrose v. Wright*, 102 Md. 105; *Royal Arcanum v. Nicholson*, 104 Md. 472; *Foxwell v. Foxwell*, 118 Md. 471; *Holloway v. Safe Deposit and Trust Co.*, 124 Md. 539.

The general rule undoubtedly is that a decree or decretal order, after enrolment, can be revised or annulled only by a bill of review or original bill and not by a petition, but there are exceptions to the rule, equally well established as the rule itself; which are generally classified as follows: 1. In cases not heard upon the merits; 2. Where the circumstances are such as to satisfy the Court that the decree should be set aside, and 3. Where the decree was entered by mistake or surprise.

The law being now so well settled, we have only to determine whether to the facts and circumstances of each case the general rule applies, or whether the case falls within one or more of the three exceptions to such rule. If in this case it should be found that the facts and circumstances as disclosed by the petition are not such as to take the case out of the general rule, then, of course, the Court below was in error in overruling the demurrer; but if it should be found from the facts and circumstances disclosed by the petition that the case falls within one or more of the exceptions to the rule, the Court below was right in its ruling upon the demurrer.

Md.]

Opinion of the Court.

It is disclosed by the petition that the bill of the appellant asking for a divorce from the petitioner upon the ground of adultery, was answered by her through counsel, and thereafter testimony was taken on behalf of the complainant to sustain the allegations of his bill. The petition alleges, however, that as a matter of fact she had no knowledge that the charge of adultery was to be made against her, or that it had been made until after the passage of the decree divorcing her from her husband, at which time she was not only surprised, but naturally indignant, and was anxious that an opportunity be afforded her to defend her character against such charge, and we may infer from the facts disclosed by the petition that the answer admitted the truth of the charge. The appellee, of course, as disclosed by the petition, knew that a proceeding was to be or had been instituted by the appellant for the purpose of obtaining a divorce from her, and the attorney selected by the husband was authorized by her to appear for her in such proceedings, but from the allegations of the petition she had no knowledge of the grave and serious charge that was alleged against her as a ground of divorce, nor had she, with her alleged "absolute ignorance of the law" applicable to such proceedings and of the grounds upon which divorces may be obtained, as disclosed by the petition, any sufficient reason to think that such charge against her chastity would be made the basis or ground of the divorce. She had been asked not to resist the divorce, but to consent to its passage, and had been told that if she did not consent to such divorce he would resign his position with the railroad company and leave, throwing her upon her own resources. It was under these facts and circumstances that the attorney selected by her husband was authorized, by the letter written and mailed by himself, but signed by her without knowing the full meaning and purport thereof, to appear in the proceedings as her counsel. He was to make no defense to the allegations of the bill, but was simply to admit its allegations and consent to the passage of the

decree as prayed. At such time the bill, if prepared, was not filed and its contents were not known to the appellee, and especially the charge upon which the divorce was granted, and, as the petition alleges, she never learned of such charge until after the decree was passed.

In our judgment, this case, upon these facts considered with other important facts alleged in the petition, which we deem unnecessary to discuss, clearly falls within the exceptions to the rule, at least within the exception that the decree was entered under such circumstances as to satisfy the Court, in the exercise of a sound discretion, that the enrolment ought to be discharged and the decree set aside.

And as to the question of laches, this Court in *National Bank v. Eccleston, supra*, said: "The power to open the enrolment is a discretionary power to be exercised or not *according to the circumstances of the case* as being applicable, as well to the time when the petition is to be filed as in other respects." The record discloses that the decree was passed on March 10th and the petition asking that it be annulled was filed on July 28th following. It is not shown that after the passage of the decree and before the filing of the petition the status or position of the appellant, as a result or in consequence of the decree, was in anywise changed, it remained the same, and in our opinion, the facts and circumstances of the case are not such as to justify us in holding that this lapse of time is a bar to the relief sought by the petitioner.

Therefore, from what we have said, the Court below, in our opinion, committed no error in overruling the demurrer to the petition of the appellee. The order overruling the demurrer will be affirmed.

Order affirmed, with costs in this Court to the appellee, and the case remanded.

Md.]

Syllabus.

THE SAFE DEPOSIT AND TRUST COMPANY OF
BALTIMORE, TRUSTEE, IN THE MATTER OF THE
TRUST ESTATE OF RICHARD
SWANN, DECEASED.

Tax sales: Anne Arundel County; notice to owner; joint owners; co-tenants, not agents.

Section 229 of Article 2 of the Code of Public Local Laws, relating to tax sales in Anne Arundel County, requires that notice be served upon the owner of the property, if this can be done under the prescribed conditions. p. 522

This right of the owner to be notified does not depend upon his occupancy of the land, and if he is not in possession, notice must be delivered to him elsewhere in the district, if he is a resident of that locality. p. 523

It is only when the owner can not be given personal notice, within the district, that the alternative method of notification can be resorted to. p. 523

The law authorizes no discrimination, as to notice, in the case of plural ownership, and all who are charged with the taxes and own the land are entitled to a personal notice, before their rights can be affected by such a sale, provided they are within the reach of the service that the Act prescribes. p. 523

As ownership, and not occupancy, is the basis of the provisions for the successive notices, the mere fact that one tenant in common is in possession does not deprive the other owners, resident in the same locality, of their right to be warned of the approaching sale of their property. p. 523

The legal relationship between tenants in common does not imply agency on the part of a tenant in possession for the other co-tenant, with respect to notice of outstanding claims affecting the title. p. 523

Syllabus.

[125]

In proceedings for the sale of property to enforce the collection of taxes, the jurisdiction of the Court to which the sale is reported is special and limited, and can be exercised only when there has been a substantial compliance with the provisions of the law. p. 523

While the order of ratification gives presumptive validity to a tax sale, yet if it appears from the record or proof that there has been a failure in any material feature in any respect to observe the requirements of the statute, the attempted transfer of title, by the sale, must be held inoperative and void. p. 524

Decided April 7th. 1915.

Appeal from the Circuit Court for Anne Arundel County.
(In Equity.) (BRASHEARS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Daniel R. Randall, for the appellant.

James M. Munroe, for the appellee.

URNER, J., delivered the opinion of the Court.

The Safe Deposit and Trust Company of Baltimore, as trustee under the will of Richard Swann, deceased, sold a tract of thirty acres of land in Anne Arundel County for the sum of seven hundred dollars, and the sale was duly reported to the Circuit Court for that county, whose jurisdiction over the trust had been previously invoked. Exceptions were filed by the purchaser to the ratification of the sale. The main ground of objection is that the title proposed to be conveyed is not good and marketable. This contention was sustained by the Court below, and from its order setting aside the sale an appeal has been taken by the trustee.

Md.]

Opinion of the Court.

The title of the Trust Company was obtained by its purchase of the property under foreclosure of a mortgage which it held for the benefit of the trust estate and which had been executed by John Henry Johnson and wife on April 15, 1911, to secure a loan of seven hundred dollars. It was recited in the mortgage that the tract had been conveyed to Johnson by deed from B. Allein Welch, treasurer of Anne Arundel County, dated May 19, 1905, and duly recorded. The tax sale proceedings which resulted in the conveyance last mentioned include a report by the treasurer to the Circuit Court showing that the land was sold on December 30, 1902, to John Henry Johnson for thirty-five dollars in the enforcement of claims for taxes in arrears for 1899 and 1900, amounting, with interest and costs, to \$30.04. It appears from the tax bills exhibited with the report that the property was assessed at \$404.00 for the purposes of taxation. It is in evidence that the land formerly belonged to Margaret Anna Johnson, a widow, who died intestate some years prior to the sale, leaving eight children as her heirs at law. The property was thereafter entered on the assessment record, and the tax bills referred to were made out, in the name of "Margaret Anna Johnson Heirs." One of the persons included in this designation was John Henry Johnson. When the sale occurred he was in sole possession of the premises. The evidence shows that some of the other co-tenants were residing in the same neighborhood, but there are some whose places of residence at that time are not proven. The notices required by law to be given before the property could be sold for taxes were served upon "John Henry Johnson, one of the heirs of Mary A. Johnson, deceased," and, as already stated, he became the purchaser.

The objection to the title is based primarily upon the ground that the notice served upon only one of the co-tenants, even though he was then in possession, was not sufficient to gratify the terms of the statute prescribing the notices to be given as pre-requisites to a valid sale.

It is provided by section 229 of Article 2 of the Code of Public Local Laws, relating to Anne Arundel County, that it shall be the duty of the treasurer, during the month of March succeeding each levy, to make out all tax bills which have not been paid, with a notice in each that if it remains unpaid on the first day of June next after its date, the property will be levied upon and sold to enforce payment, and that a copy of each bill so prepared shall be delivered by a constable of the district "to the person or corporate institution against whom it is made out; or in the event of failure to find such person or taxpayer in the district, such tax bill shall be left with the agent of such person or institution, or conspicuously posted on the property assessed." The treasurer is directed by section 230 to enforce the payment of all taxes remaining unpaid on the first day of June succeeding the year in which they were imposed, but it is enacted that when property is levied upon for that purpose, "notice thereof together with a copy of the bill of taxes due * * * shall be delivered to the owner, if he be in possession of the property, or at his residence, if it be within the same district, or mailed to him if his postoffice address be known, and if not, then to be conspicuously posted on the premises, together with a notice that if the said bill for taxes, interest and costs, be not paid within thirty days, the property levied upon will be sold at public sale." Provision is made by section 231 for a report of the sale to the Circuit Court by the treasurer, and for its ratification if the proceedings are regular and there has been a substantial compliance with the statute.

In view of these provisions, and of the facts we have stated, the question to be decided is whether the delivery of the preliminary and final notices to the co-tenant in possession was adequate for the purposes of the ensuing sale.

It is the evident intention of the Act to require the notices to be served upon the *owner* of the property, if this can be done under the prescribed conditions. The right of the owner to be notified is not made dependent upon his occu-

Md.]

Opinion of the Court.

pancy of the land. In the event that he is not in possession, the copy must be delivered to him elsewhere in the district, if he is a resident of that locality. It is only when the owner cannot be given personal notice, within the district, that the alternative methods of notification can be employed. The bills in this case were made out against the "heirs" of the former proprietor, and the persons thus described were then in fact the owners of the property assessed. The law does not authorize any discrimination, as to notice, in cases of plural ownership, and it is clear that all who are charged with the taxes and own the land are entitled to personal notice before their rights can be affected by a sale, provided they are within reach of the service which the Act prescribes. If none of the owners occupied the property, it could not be contended that a notice given to only one of several co-tenants residing in the district should be regarded as sufficient. As ownership and not occupancy is the basis of the provisions for the successive notices, the mere fact that one tenant in common was in possession could not deprive the other owners, resident in the same locality, of their right to be warned of an impending sale of their property.

The legal relationship between tenants in common does not imply an agency on the part of one in possession, for the other co-tenants, with respect to the receipt of notice of outstanding claims affecting the title, *Freeman on Co-tenancy and Partition*, 2nd Ed., sec. 171; 38 *Cyc.* 106; but even when there is an agent on the ground, the delivery to him of the preliminary notice would not be effective if the owners are in a position, under the terms of the Act, to be personally notified, and the final notice is not directed to be served upon an agent under any circumstances.

In a proceeding for the sale of property to enforce the collection of taxes the jurisdiction of the Court to which the sale is reported is special and limited and cannot be validly exercised unless there has been a substantial compliance with the provisions of the law. The order of ratification gives presumptive validity to the sale, but when it

appears from the record or proof that there has been a failure in any material respect to observe the requirements of the statute, the attempted transfer of the title must be held to be inoperative and void. *Taylor v. Forrest*, 96 Md. 530; *McMahon v. Crean*, 109 Md. 652; *Amos v. Abromaitis*, 122 Md. 256. In the case last cited, which involved a tax sale under the same local law we are now considering, the owner of the land sought to be sold, against whom the tax bills were made out, was dead, and the notices of the intention to enforce payment of the taxes were left with the tenant in possession. It was held that this was not a substantial compliance with the Act. The same view must be adopted in reference to the proceedings now in question. The notices given in this instance having been confined to one of several owners who were equally entitled to personal service, on account of their residence in the district in which the property was located, there was a manifest failure to observe the law in one of its most material requirements.

While a considerable period has elapsed since the tax sale was made and ratified, and while those adversely affected have taken no formal action to have the sale annulled, the present purchaser could have no assurance that they will not contest the title. Some of them have apparently regarded their interests as still subsisting, and one, a widowed daughter of Margaret Johnson, built a small dwelling house on the land, a few years after the tax sale, with the consent of other heirs, and is living there at the present time. It would not be just to compel the objecting purchaser to accept a title thus exposed to probable litigation. As it stands at present it is not the good and marketable title which he has a right to demand. *Hewitt v. Parsley*, 101 Md. 209; *Hammer v. Westphal*, 120 Md. 19.

This conclusion renders it unnecessary to pass upon the other grounds of exception to the sale reported by the trustee.

Order affirmed, with costs.

Md.]

Syllabus.

CALEB C. MAGRUDER, ET AL.

vs.

STATE ROADS COMMISSION.

State Roads Commissioners: authority and discretion. Jurisdiction of courts.

The courts have the right to prevent the State Roads Commission from diverting funds appropriated by the Legislature for the building and improvement of one road, or set of roads, to the construction of another or others. p. 532

But to justify a Court in interfering with the powers and the large discretion vested in the commission, it should be very clearly shown that it was improperly using the funds. p. 533

In appropriating the funds among the different roads in districts of a county, for every difference of opinion their judgment should not be reviewed by the courts. pp. 534-535

Decided May 7th, 1915.

Appeal from the Circuit Court for Anne Arundel County.
(In Equity.) (BRASHEARS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

S. S. Field, for the appellants.

Leon E. Greenbaum, for the appellee.

Boyd, C. J., delivered the opinion of the Court.

The appellants, some of whom are taxpayers of Prince George's County and others of Anne Arundel County, filed a bill for in injunction against the members of the State Roads Commission, (a) to restrain them from expending any portion of the Road Loans Fund provided for by Chapter 267 of the Acts of 1914, allowed to Prince George's County, upon the road from Meadows to Camp Springs, or upon any other road not a part of a main gap of the State Roads system selected by the State Roads Commission in 1909, etc.; and (b) praying that a mandatory injunction may also be issued at once compelling the defendants to apply the amount of \$74,536, the balance claimed to be in hand for road construction in Prince George's County, only upon what is called the "Old Stage Road." After an answer was filed and testimony taken, the Court below passed a decree dismissing the bill, and from that decree this appeal was taken.

Chapter 141 of the Acts of 1908, which created the State Roads Commission, provided for "the establishment of a system of public roads and highways, in Maryland." It directed in section 32H (now sec. 40 of Art. 91 of the Code of 1912) that "The general system of public roads hereinbefore provided for in this Act shall be completed as soon as may be feasible by the said Commission, the time for the completion thereof, not to exceed, however, seven years from 1st day of July, 1908; and the aggregate and total expenditures of the said Commission for said purposes shall not exceed the sum of five million dollars (\$5,000,000), of which sum not more than one million dollars (\$1,000,000) shall be expended in any one year, accounting from said 1st day of July, 1908." It is manifest that when that Act was passed the stupendous undertaking in which the State was engaging was not fully realized, as at each session since then the Legislature has been called upon to pass laws on the subject and make additional appropriations. State Road Loans have been authorized since 1908 as follows: \$1,000,000 in 1910, \$3,170,000 in 1912 and \$6,600,000 in 1914, or

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\$10,770,000 since the original Act, in addition to smaller sums appropriated for the State Road purposes. In considering the Act of 1908 we must therefore remember that it was then providing for a system, the cost of which was not to exceed \$5,000,000, while now there has been spent and authorized over three times that amount, and there is not yet sufficient to complete the system as originally contemplated and shown by the maps filed under the provisions of section 32B of the original Act, which is as follows: "The said Commission, in addition to the powers hereinbefore mentioned, shall have full power and be charged with the full duties to select, construct, improve and maintain such a general system of improved State roads and highways as can reasonably be expected to be completed with the funds herein provided in and through all the counties of this State. The said Commission shall reach its conclusions as to the selection of the roads to be improved on or before May 1, 1909, and shall on or before that date file with the County Commissioners of each county for public inspection a certified copy of a map of the State showing plainly thereon the adopted system of main roads to be improved under this Act, which map shall bear the written approval of the said Commission."

If it was supposed that the "general system of improved State roads and highways" could thus "reasonably be expected to be completed with the funds" therein provided "in and through all the counties of this State," those making the estimate fell far short of what it would require. Certain it is that all of the roads selected in Prince George's County, for example, could not have been built with improved material with the amount appropriated before May 1st, 1909, when the map was required to be filed, and had not the State Roads Commission had very great discretion vested in it the construction would probably not have been commenced without further legislation. That Commission had to determine which of the various roads they had selected for improvement should be improved, and it could not then have

been contended that the Court could require the Commission to improve the "Old Stage Road" first, or second, or in any particular order. There is nothing in the selection of the five roads selected, and hereinafter mentioned, designating the order in which they should respectively be improved.

But it is contended on behalf of the appellants that Chapter 267 of the Acts of 1914, which appropriated \$5,000,000 to the counties and \$1,600,000 to building a bridge over the Patapsco River from Baltimore City to Brooklyn, and the balance, if any, to the streets of Baltimore City, contains a provision which does require the money to be applied to the "Old Stage Road" in preference to the two contemplated by the Commission which are now objected to. The said sum of five million dollars was by section 8 of Act of 1914 appropriated to the several counties by regular appropriation on county road mileage basis (as the original Act did) and by special appropriations. By it Prince George's was entitled to \$108,800 on the mileage basis and \$116,200 as special appropriation, making \$225,000 in all. Following the various appropriations to the counties is this provision: "That the five million dollars (\$5,000,000) provided for the counties shall be expended in paying for the work already done in counties in excess of previous allotments, in finishing the work now under construction and not completed, and shall then be applied, first, to filling in the main gaps of the system, and that the balance remaining thereafter shall be applied to secondary gaps for necessary bridges, for rights of way, for over-head expenses, for the construction and maintenance of the Washington Boulevard (\$50,000), and for other miscellaneous purposes."

About \$57,000 of the \$225,000 was used in paying for work which had been done in that county prior to the Act of 1914, in excess of previous allotments, so that only about \$168,000 was available at the beginning of the operations in 1914. Five routes were determined upon prior to May 1st, 1909, in accordance with the Act of 1908. The following resolution was adopted by the Commission on October 5th,

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1908: "Final location of roads in Prince George's County. Dr. Remsen moved that the road to be selected as a State Road in Prince George's County shall start from the Charles County line, near Mattawoman by way of T. B., Clinton, Camp Springs, Silver Hill to the District Line; from the District Line by way of the Washington-Marlboro Pike to Oakland, Forestville, Meadows to Marlboro; from the District Line over the Central Avenue road to Seat Pleasant to Hall Station to the Patuxent River near Hardesty, by the most direct route; from Bladensburg on the Washington Boulevard by the way of Buena Vista, Collington to Priest's Bridge, and from a point near Camp Springs, on the road from Charles County to the District Line, to Meadows. on the Washington and Marlboro Turnpike, or as much thereof as the funds will permit. The motion was seconded by Governor Crothers, and adopted." In the answer, those roads are named, and as the evidence refers to them as there numbered it will be convenient to quote from the answer:

"(a) A road running from Bladensburg to Priest's Bridge and known as the 'Old Stage Road,' being of about fourteen miles in length. (b) A highway known as the Central Avenue Road, running from the District Line via Seat Pleasant Hall to Hardesty, being of about fourteen miles in length. (c) A highway running from the District of Columbia via Oakland, Meadows, Marlboro to Hill's Bridge, being of about sixteen miles in length. (d) A highway running from the District of Columbia line via Silver Hill, Camp Springs, Clinton, T. B., to the Charles County line, being of about sixteen miles in length. (e) A highway running from Camp Springs to Meadows, there connecting with the highway referred to as (c) herein, being of about three miles in length."

Of the \$168,000 available at the beginning of the operations in the year 1914, about \$9,400.00 was used on road (d) from T. B. to Mattawoman, about \$18,000 on road (b) from the District Line to Seat Pleasant, about \$38,700 on road (b) from Seat Pleasant to Largo, and about \$36,800 for resurfacing on route (d) from the District Line to Camp Springs,

and apparently several thousand dollars in addition were spent, but not explained in the testimony, which shows a balance of about \$63,000 to be used on the roads in that county which were still unfinished when this bill was filed. As the estimate is that it would cost about \$154,000 to build the Old Stage Road, it is evident that that can not be built out of the balance in hand, and if the \$63,000 were spent on it there would be a gap of six or eight miles left on it in Prince George's County, in addition to what there would be beyond the Anne Arundel line. Then on what is called the Central Avenue Road, which runs from the District Line to the State Road near Annapolis, which is conceded to be one of the main lines laid out by the Commission, only 2.23 miles have been completed and 2.59 are under contract, making 4.82 miles in all. That will leave nine miles of that road in Prince George's County unprovided for. As according to the estimate it would cost nearly \$100,000 to complete it, that could not be finished with the balance in hand. There is nothing whatever in the original statute or any of the subsequent ones which indicates any intention to give the Old Stage Road a preference over all of the other four selected in 1909. It is true that in the resolution of October 5, 1908, in speaking of the one from Camp Springs to Meadows, it said "or as much thereof as the funds will permit," but even if it be conceded that that could be a limitation on the Commission, or would give the Old Stage Road a preference over the one from Camp Springs to Meadows, that would not be a reason for giving it a preference over the Central Avenue Road (b) and, as we have seen, nine miles of that is yet to be built. It would seem to be much more business-like and desirable to use the balance in hand in completing the Central Avenue Road than to expend it on the Old Stage Road. So without now referring to other matters, it is unnecessary to discuss further the branch of the case by which it was sought to obtain a mandatory injunction to compel the defendants to apply the balance (erroneously stated to be \$74,536) only upon said Old Stage Road. There is no foun-

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dation for such demand, and if the Commission had granted it, it would simply have resulted in making a gap in a road which had not been commenced when the Act of 1914 was passed, or when the bill was filed.

The Commission intends to use the balance in hand to build a road from Camp Springs to Meadows and one from Marlboro to Hill's Bridge. No specific reference is made in the bill to the latter, and the only way by which it could be said to be included in the bill is the effort to have all the balance expended on the Old Stage Road, and the general clause in the prayer—"or upon any other road not a part of a main gap of the State Road System selected" in 1909—the appellants contending that it is not a main gap. There can be no doubt from the record that one of the roads selected by the Commission before May 1, 1909, was the one marked (c) above. It is true that originally it seems to have been intended, by the meeting of October 28, 1908, to stop that road at Marlboro, but on April 29, 1909, it was on motion of Mr. Shoemaker, seconded by Dr. Remsen, extended from Marlboro to Hill's Bridge, and that entire road was one of the five selected for Prince George's County and put on the map adopted on May 1, 1909. That would give a completed road from the District Line to the Anne Arundel line and only two and a half miles are required to complete it.

The other gap objected to is from Camp Springs to the Meadows. That is about three miles long. Neither that nor the one just mentioned above has yet been constructed, but the Commission proposes to do so, if not prevented by this proceeding. It is estimated that the road from Marlboro to Hill's Bridge will cost about \$25,000 and from Camp Springs to Meadows about \$36,000—the two absorbing most of the balance in hand. One of the five roads adopted October 5, 1908, for this county was "from a point near Camp Springs on the road from Charles County to the District Line to Meadows, on the Washington and Marlboro Turnpike, or as much thereof as the funds will permit." By the construction of those three miles from Camp Springs to

Meadows, there will be a State Road from La Plata, the county seat of Charles County, through Upper Marlboro, the county seat of Prince George's County, to Annapolis, the capital of the state and county seat of Anne Arundel County. The same can be said from Leonardtown, the county seat of St. Mary's County, as the State Road running through Leonardtown joins the one from La Plata to the District Line before the latter reaches Camp Springs. Then there will be a State Road from Prince Frederick, the county seat of Calvert County, via Upper Marlboro to the District Line, or anyone desiring to do so can go to Camp Springs and then down to La Plata. One of the projected roads in Southern Maryland, as shown by the maps with which we have been furnished, was from Solomon's Island, at the lower end of Calvert County, in a northerly direction through Calvert County, passing through Prince Frederick, thence into Anne Arundel County to Annapolis. Another from Point Lookout, the extreme southern end of St. Mary's, runs northerly through that county to Charles and through part of Charles until it intersects the road going through La Plata to the District Line. Another runs from Rock Point, the southern end of Charles County, northerly through Charles on to the District Line. There were three roads laid out to run easterly and westerly, as shown on the map—the one from Camp Springs through Upper Marlboro, the Central Avenue Road referred to above and the Old Stage Road. If the roads are properly laid down on the map the Central Avenue Road can not be much longer than the Old Stage Road, and is only a few miles distant from it.

We have stated the facts thus fully because they seem to us to shed much light on the question before us. We have no doubt about the right of the courts to prevent the State Roads Commission from diverting funds appropriated by the Legislature for the building and improvement of one road or set of roads to the construction of another or others, but to justify a Court in interfering with the powers and the

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large discretion vested in that Commission, it would have to be very clearly shown that it was improperly using such funds. What we said in *Weller v. Mueller*, 120 Md. 633, on that subject, must suffice, without further discussion of it. The State Roads Commission necessarily had very delicate questions to solve in locating the roads. Sometimes those of one part of a county have felt aggrieved at the action of the Commission because they located a road differently from what they wanted, and in many, possibly most, instances, those complaining were perfectly honest in their contentions, and, perhaps naturally, thought that their part of the county was better than another part for the road in question. It required firmness, intelligence and tact to deal successfully with such controversies. Presumably, at least, and we may acknowledge it as a fact, those engaged in that character of work are better qualified to determine the localities of roads and the material out of which they are to be made, than courts are, and when the members of the Commission have settled the difficult problems they often have before them, the courts should be very cautious when they are asked to interfere with them. In 1908 and 1909, there were many new questions to be determined by the Commission, and one amongst the most difficult of settlement was the character of roadbeds to be made. When the first appropriation was made, 1908, very few, if any, of those interested in the good roads movement had any very definite idea of what the cost would be, or possibly that such expensive material as concrete would be used to any extent in building roads. So now we must look at the question somewhat differently from what we might have done then.

It is not a question of building new roads, as suggested by the appellants, for all of the roads before us were in contemplation, but the question is which of those shall be built with the money now in hand. It is not altogether clear, just what was intended by the expression "first, to filling in the main gaps of the system, and that the balance shall be

applied to secondary gaps, for necessary bridges, for rights of way * * * and for other miscellaneous purposes." Bridges might be required in filling in "main gaps." It might have been necessary to obtain and pay for rights of way before the main gap could be filled in, for it is not unusual to be necessary to acquire additional property after such work is begun, in order to improve the grade or make some change which is only found to be necessary after the work is started, and when no expenditure will be required for "miscellaneous purposes" the system may be regarded as practically perfect. So the legislature could not have meant that payment of all those things must in all cases be postponed to filling in what are called "main gaps."

It must be remembered that the legislation was for the road system of the whole State, and not simply for five roads in Prince George's County. In some localities there would be no difficulty in determining what would be meant by "main gaps" and "secondary gaps." For example, take the great highway running through the western part of the State. Those familiar with it know what a beautiful road-bed could be found at places on both sides of some miles of road which would spoil, or at least greatly detract from the pleasure of the trip. For some reason many of the State Roads seem to have been built in sections, the result being a few miles of splendid road, some miles of what would be almost a misnomer to call a road, and then perhaps another good one. Sometimes there will be what is known as a main road and what are merely side or branch roads. In such localities and under such conditions, anyone could see the distinction between main gaps and those on some local road, but in such case as we have before us, the members of the Commission who give their time to the work, would be better qualified to draw the line between those classes of gaps than judges or others would. If their judgment about such matters is liable to be reviewed by the courts every time there is a difference of opinion about them, much of the State's money will be frittered away and

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the time of the Commission and their agents and employees largely occupied with litigation.

There is no evidence of such a gross error or failure of duty on the part of the Commission in this case as calls upon or authorizes the Court to interfere. On the contrary, there is much to be said in favor of the conclusion it reached. To use the balance on hand on the Old Stage Road would make a gap, rather than fill one, as no part of that road has been built. The Central Avenue Road is not far from it and runs practically parallel with it. But beyond that, the gaps which the Commission propose to fill are manifestly important ones, and will for reasons shown above be of great service to the people of Southern Maryland. The Commission properly takes into consideration the system of road it is building, and not merely a part of it in one county. The system can not be advantageously worked unless the connections, etc., by the roads in one county with those of other counties are kept in mind. Certain it is, in our judgment, that neither the road from Camp Springs to Meadows, which connects the roads in Southern Maryland running north and south, by joining the one numbered (d) with that numbered (c) above, or the road to Hill's Bridge, which completes that road through the county, is so clearly a secondary gap, and not a main gap of the system, within the meaning of the statute, as would justify the Court in interfering with the Commission. So without further discussion of it we will affirm the decree.

Decree affirmed, the appellants to pay the costs, above and below.

HENRY F. WINGERT AND WILLIAM WINGERT,
ADMINISTRATORS OF P. HAGER WINGERT,
DECEASED.

vs.

THE STATE OF MARYLAND.

Testamentary law: collateral inheritance tax; appraisers; appointment by Orphans' Court; removal; appointment of other appraisers.

Under sections 124, 129 and 135 of Article 81 of the Code (1912), providing that in all cases where real estate of any kind is subject to the (collateral inheritance) tax, the Orphans' Court of the county in which administration is granted shall appoint the same persons to appraise and value the real estate who may have been appointed to value the personal estate, such Orphans' Court has the power and jurisdiction to entertain and determine the question of an additional and amended inventory and appraisal of the real estate of the decedent, and to receive and hear evidence in relation to it. p. 540

Under section 235 of Article 93 of the Code, the Orphans' Courts have full power to direct the conduct and accounting of executors and administrators, superintend the distribution of estates, and administer justice in all matters relating to the affairs of deceased persons. p. 541

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But until appraisers duly appointed under said section 124 are removed by the Court, it has no authority to appoint others in their places. p. 542

It is within the power of an Orphans' Court, upon charges of incompetency, neglect of duty, or unfaithful conduct, injurious to the estate, sustained by proof, upon hearing, to remove the administrator or appraisers, and appoint others in their places. p. 542

The Orphans' Courts are without jurisdiction to try and determine questions of title to real estate. p. 543

Decided April 8th, 1915.

Appeal from the Orphans' Court for Washington County.

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE and CONSTABLE, JJ.

Henry F. Wingert and Harvey R. Spessard (with whom was *Miller Wingert* on the brief), for the appellants.

Edgar Allan Poe, the Attorney General, (with whom was *Scott M. Wolfinger, State's Attorney for Washington County*, on the brief), for the appellee.

BRISCOE, J., delivered the opinion of the Court.

This is an appeal from an order of the Orphans' Court of Washington County, dated the 30th day of October, 1914.

The questions presented by the record arise on a motion to dismiss certain proceedings in that Court in a matter concerning the inventory and appraisal of the real estate of P. Hager Wingert, deceased, returned by the administra-

tors of his estate and by the appraisers appointed to value the real estate, for the purpose of fixing the collateral inheritance tax provided by sections 120 to 144 of Article 81 of the Public General Laws of Maryland.

The order appealed against is somewhat unusual and is as follows: Ordered this 30th day of October, A. D. 1914, that the motion made on the 26th day of October, 1914, by the administrators of P. Hager Wingert, deceased, and the appraisers appointed to appraise the real estate of said deceased, to dismiss the proceedings as to said appraisement, be and the same is hereby overruled; that the said administrators withdrew the inventory and appraisement returned by them on the 5th day of August, 1914; that they nominate for appointment by the Court two other qualified persons to appraise the real estate of P. Hager Wingert, deceased, and that they include in the inventory and appraisement returned by them, the six parcels of real estate of which Eliza J. Wingert died seized and possessed, mentioned in the testimony given in these proceedings.

It is further ordered that the costs of these proceedings shall be paid out of the estate of said P. Hager Wingert, deceased.

The substantial facts, upon which the proceedings are based, are these: P. Hager Wingert, of Washington County, died intestate, on or about July 23rd, 1913, and letters of administration were granted by the Orphans' Court of Washington County upon his estate to Henry F. Wingert and William Wingert, two brothers of the deceased, the appellants here. He died without children, but left certain brothers and sisters, as his heirs at law.

On the 20th of February, 1914, upon nomination of the administrators, two appraisers were appointed to appraise the real estate of the deceased for the purpose of ascertaining the amount of the collateral inheritance tax to be charged for the use of the State, on the real estate passing to his brothers and sisters.

Md.]

Opinion of the Court.

On the 5th of August, 1914, an inventory and appraisement of six parcels of real estate, situate in Washington County, was returned to the Court at a valuation of \$81,-315.00 and in the return it was stated, that P. Hager Wingert was at the time of his death seized and possessed of an undivided one-seventh interest in this property, to wit, \$11,-616.43.

The Orphans' Court declined to accept this inventory and appraisement as returned as a true inventory and a correct valuation of the real estate left by the deceased, and thereupon, on the 7th day of August, 1914, directed the administrators and appraisers to be cited and summoned to appear on the 14th of August, 1914, and show cause why there should not be returned an additional and amended inventory and appraisement of the real estate of the deceased.

The administrators appeared in response to the summons, and after a hearing, upon full proof, on both sides, and after argument by counsel for the respective parties, the Orphans' Court held, as set out in the order appealed from, that there was omitted from the inventory (possibly through a mistake as to the law) six parcels of real estate which passed from Eliza J. Wingert to her heirs at the time of her death, of which heirs P. Hager Wingert was one; that the valuations returned by the appraisers of the parcels of real estate which were named to them by the administrators were not the true, clear value of the same and could not be accepted by the Court as a basis upon which to calculate the collateral inheritance tax due from the interest of P. Hager Wingert in the parcels of real estate returned in the inventory by them, as such administrators.

The appellants contend and urge four grounds for the reversal of the order, and why the proceedings should be dismissed:

1st. Because no petition or proper proceedings has been filed by anyone asking for any relief with reference thereto;

2nd. Because the Court was without jurisdiction in the premises;

3rd. Because no charge of fraud or mistake has been alleged by anyone with reference to the appraisement; and

4th. Because the return of the appraisers in the matter of appraisement, in the absence of fraud or mistake, establishes the true value of the real estate and is conclusive thereof.

It is clear, we think, that it was entirely within the power and jurisdiction of the Orphans' Court to entertain and determine the question of an additional and amended inventory and appraisement of the real estate of the deceased, in this case, and the Court having jurisdiction had the right to hear and receive evidence in relation to it.

By sec. 124 of Art. 81 of the Code of 1912, it is provided, that in all cases where real estate of any kind is subject to the (collateral inheritance) tax the Orphans' Court of the county in which administration is granted shall appoint the same persons who may have been appointed to value the personal estate to appraise and value all the real estate of the deceased within the State.

By section 129 of the same Article, it is provided, the appraisers shall return the inventory when completed to the executor or administrator, whose duty it shall be to return the same to the office of the register of wills, to which the inventory of the personal estate is returnable, and within the same time and under like penalty, and shall make oath that the inventory or inventories is or are a true and perfect inventory or inventories of all the real estate of the deceased, within this State, that has come to his knowledge, and that, should he thereafter discover any other real estate belonging to the deceased, in this State, he will return an additional inventory thereof.

By section 130 of the same Article the appraisement as made shall be deemed and taken to be the true value of the real estate upon which the tax shall be paid.

Md.]

Opinion of the Court.

Section 135 of Art. 81 (1912), empowers the Orphans' Court in case the parties shall neglect or fail to pay the tax as provided by the statute, to order the administrator to sell for cash so much of the real estate as may be necessary to pay it and all the expenses of the sale.

It seems, then, without doubt that both under the statute and under the general power conferred by law, the Orphans' Courts of the State are the proper tribunals to act, and to conduct the proceedings in the enforcement of the collection of this tax imposed by law upon the estates of decedents.

In *Alexander v. Leakin*, 72 Md. 199, this Court said: There can be no doubt as to the power of the Orphans' Court generally fully to administer the estate of deceased persons, for the Code, Article 93, section 235, provides it shall have power to direct the conduct and accounting of executors and administrators, superintend the distribution of estates of intestates and administer justice in all matters relating to the affairs of deceased persons. And in *Macgill v. Hyatt*, 80 Md. 256, it is said the last clause of the section quoted is very broad, and shows the legislative intention was to confer adequate power and jurisdiction upon Orphans' Courts in every case in which their general powers would enable them to act.

The scope and power of the Orphans' Court under the various sections of Article 93 of the Code in the administration of decedents' estates, has been considered and passed upon by numerous cases in this Court, and as this case falls within the principles enunciated by these cases, a few of them will be cited here. *Lee v. Price*, 12 Md. 253; *Cummings v. Robinson*, 95 Md. 85; *Stonesifer v. Shriver*, 100 Md. 28; *Dalrymple v. Gamble*, 66 Md. 298; *Grill v. O'Dell*, 111 Md. 68; *Miller v. Gehr*, 91 Md. 710; *Fowler v. Brady*, 110 Md. 204; *Pratt v. Hill*, 124 Md. 256; *Linthicum v. Polk*, 93 Md. 84.

There can be no question, then, under the authorities in this State, of the correctness of the action of the Orphans'

Court in holding that it had jurisdiction under the facts disclosed by the record to act, and to hear this case, and there was no error in that part of its order overruling the appellant's motion to dismiss the proceedings.

We can not, however, concur in that part of the order directing the administrators to nominate for appointment by the Court two other qualified persons to appraise the real estate of the deceased for the purposes indicated, so long as the order of the Court of the 20th of February, 1914, and the warrant issued in pursuance thereof, appointing the appraisers, remained in full force and unrevoked. Messrs. Corderman and Humrichhouse had been duly appointed and constituted the appraisers, under section 124 of Article 81 of the Code, to value the real estate of the deceased, and there is nothing in the record to show that they had been removed by the Court prior to the order in this case.

It would clearly have been competent and entirely within the power of the Orphans' Court, upon charges of incompetency, neglect of duty, or unfaithful conduct, injurious to the interest of the estate, if sustained by proof and upon a hearing, to have removed either the administrators or the appraisers and to have appointed others in their places. *Cox v. Chalk*, 57 Md. 569; *Carey v. Reed*, 82 Md. 394; *Schouler on Executors and Administrators*, sec. 154.

But the record in this case fails to disclose that this was done. The order appealed from, not only directs the administrators to withdraw the inventory and appraisement returned by them on the 5th of August, 1914, and to include certain named property in the inventory and appraisement returned by them, but it directed the administrators to nominate for appointment by the Orphans' Court two other qualified persons to appraise the real estate of the deceased.

For the reasons stated, we think that part of the order directing the nomination for appointment of two other persons as appraisers, without removing those previously appointed, was error.

Md.]

Opinion of the Court.

We will, therefore, reverse that part of the order which directs the administrators to nominate for appointment two other qualified persons to appraise the real estate of the deceased, but will affirm the order in other respects as to filing an amended and additional inventory and remand the cause for further proceedings.

As to the six parcels of real estate standing in the name of Eliza J. Wingert, deceased, mother of the intestate and directed by the Orphans' Court to be included in the inventory and appraisal, we need only say that as the title to the property stood in the name of Mrs. Wingert at the time of her death it was liable to the tax. It is admitted that it was not returned in the inventory, then on file in the Orphans' Court.

It was contended upon the part of the appellants that these lands were not subject to the tax because they were held by the mother as trustee for her children. That the land had been purchased and paid for by the heirs of the mother and the title taken in the name of the mother, as a matter of convenience. The Orphans' Court declined to hear and determine the question of title, under the facts of the case, and in this conclusion we entirely concur.

It has been repeatedly held by this Court that the Orphans' Courts of this State are without jurisdiction to try and determine questions of title to real estate, such as was sought to be raised here, and we need not discuss this question further.

Order reversed in part and affirmed in part, and cause remanded for further proceedings, the costs to be paid out of the estate of P. Hager Wingert, deceased.

FREDERICK E. WEBER ET AL., MAYOR AND COMMON
COUNCIL OF MT. RAINIER,

vs.

JOHN E. PROBEY, ET AL.

*Taxation: illegal; injunction at suit of taxpayers. Statutes:
constitutionality of—; duty of courts; title of statute;
defective; section 29 of Article 3 of Constitution.*

*Mt. Rainier sewers: Chapter 250 of the
Acts of 1914; unconstitutional.*

Taxpayers of an incorporated town or city have the right to proceed in equity to enjoin the municipal authorities from making a contract or incurring obligations which they have no lawful power to make or incur, and which, if made or incurred, will increase the burden of taxation. p. 550

The courts will not declare an Act unconstitutional, because it is unwise or inexpedient, nor will they strike it down, because it will operate harshly upon persons affected by it. These are matters committed to the judgment of the law-making power. They are purely political, and are not reviewable by the courts. p. 551

Courts will not declare void an Act of the Legislature, if by any reasonable construction it can possibly be maintained.

p. 551

Md.]

Syllabus.

The purpose of section 29 of Article 3 of the Constitution, relating to the titles of statutes, is "to prevent 'logrolling' legislation; to give the people general notice of the character of the proposed legislation, so they may not be misled; to give all interested an opportunity to appear before committees of the Legislature and to be heard upon the advisability of the proposed legislation; to advise members of the character of the proposed legislation, and to give each an opportunity to intelligently watch the course of the proposed bill; to guard against fraud in legislation, and against false and deceptive titles."

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Under this section, although the title of a statute need not give the provisions of the statute in detail, nor even an abstract of them, it must not be misleading.

p. 552

Chapter 250 of the Acts of 1914, by its title authorizes the Mayor and Council of Mt. Rainier to levy taxes on the assessable property of the town, to redeem the bonds authorized for the construction of the sewer system, etc., provided for; while section 7 of the Act authorizes the assessment of the same upon abutting property owners, and the title of the Act being at variance with the provisions of the Act itself, is misleading, and the Act is unconstitutional and void.

pp. 552-553

And this provision of the Act is so connected with the purpose and scheme of the Act, that it is not to be presumed that the Legislature would have passed the Act without it, and the whole Act is void.

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Decided April 8th, 1915.

Appeal from the Circuit Court for Prince George's County.
(In Equity.) (BEALL, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

R. Lee Van Horn and *T. Howard Duckett* (with whom was *Marion Duckett* on the brief), for the appellant.

F. Snowden Hill and *James C. Rogers*, for the appellee.

THOMAS, J., delivered the opinion of the Court.

The bill in this case was filed by John E. Probey and others as land owners and taxpayers of the town of Mount Rainier, in Prince George's County, in behalf of themselves and all other land owners and taxpayers of said town, against Frederick E. Weber and others, assuming to act as the Mayor and Common Council of Mount Rainier, to enjoin them from offering for sale or selling any bonds or exercising any of the powers conferred by Chapter 250 of the Acts of 1914, and from levying or collecting any tax on the real estate in the town for the payment of the principal of the bonds referred to in said Act or the interest thereon.

4 The Act, which is set out in the bill, declares in its title that it is "An Act to authorize and empower the Mayor and Common Council of the Town of Mount Rainier, a municipal corporation, in Prince George's County, to issue bonds and appropriate the proceeds arising from the sale thereof for establishing, constructing and maintaining a sewer and water system in said town of Mount Rainier; to submit the issue of said bonds to the qualified voters thereof for determination; to condemn such land as may be necessary for the building of said system, and to levy taxes on the assessable property of said town to redeem said bonds and to pay the interest thereon."

t The first section authorizes and directs the Mayor and Common Council to issue coupon bonds to an amount not exceeding the sum of \$100,000.00, to be designated "Mount Rainier Sewer and Water Bonds," for the purpose of establishing, constructing and maintaining a sewer and water system for the town, the bonds to be issued for sums not less than \$500.00 or more than \$1,000, and to bear interest

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at a rate not exceeding six per cent per annum, payable semi-annually. The second section provides that the bonds shall be numbered consecutively and be redeemable "in their proper order," as follows: Two thousand dollars thereof three years after the date of issue, and two thousand dollars thereof annually thereafter, and that they shall be sold at public auction, "or by sealed bids," to the highest responsible bidder, after "due advertisement," at not less than par.

Section three directs that the amount realized from the sale of the bonds shall be applied solely to the construction and maintenance of the sewer and water system, and that the Mayor and Common Council "shall have the power and authority to determine where and in what order, and under what streets, roads and public highways of the town the sewer mains and water mains shall be established, constructed or laid;" to determine the kind of system to be constructed; to make all contracts for the same and to pass all orders for the payment of the costs thereof and for land purchased or condemned.

Section four provides how contracts for the construction of the system may be awarded; section five authorizes the Mayor and Common Council to purchase or condemn any land, private water and sewer mains, wells or streams, etc., that they may deem necessary for the system, and section six declares that the title to the system when completed shall be vested in the town, and that the Mayor and Common Council shall have the power to fix schedules of rates for furnishing water and sewer facilities, and to pass all necessary ordinances, "with penalties for their violation, for the proper installation, security, protection and use of said sewer and water system; and to make such extensions of said sewer and water system, or either, as may from time to time appear necessary to them." Section 7 is as follows: "That for the purpose of paying said bonds and the coupons thereon, issued under the provisions of this Act, the said Mayor and Common Council * * * shall have authority, and are hereby authorized, empowered and directed so to do, to annually

assess equally against the total number of front feet of all real estate in said town abutting on sewer and water mains, and to levy thereon as a special sewer and water tax, an amount sufficient to pay the said bonds and the coupons thereon, as said bonds and coupons may severally mature as hereinbefore provided, the owner or owners of said abutting real estate being assessed in proportion to the number of assessable front feet owned by him, her or them; provided, that when corner property under one ownership fronts or abuts on two streets or public highways containing sewer and water mains, and which said property requires but one service, the abutting front feet shall be computed for the purpose of the assessment and levy thereunder as one-half of the total number of front feet bordering on both streets * * *. Said Mayor and Common Council shall have full power to collect the special sewer and water tax herein provided in the same manner as the regular town taxes in said town * * * are collected; and when said tax is collected it shall be applied as hereinbefore provided."

+ Section 8 provided for the appointment by the Mayor, with the consent of the Common Council, of a "Sewer and Water Commission," whose duties are to "be advisory solely," and section 9 requires the question of issuing the bonds referred to be submitted to the qualified voters of the town at a special election to be held on the third Tuesday of April, 1914, and, in case it is not then approved, to be again submitted at a special election to be held on the third Tuesday in April, 1915, and declares that all persons qualified to vote at the regular town election to be held in May, 1914, shall be qualified to vote at the special election in April, 1914, and that all persons qualified to vote at the regular town election to be held in May, 1915, shall be qualified to vote at the special election in April, 1915.

The bill alleges that the plaintiffs own real estate in the town of Mount Rainier and are all residents thereof except James C. Rogers, and that they will be required to pay such taxes as may be levied by the Mayor and Common Council;

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Opinion of the Court.

that the defendants, acting under the supposed authority of said Act, have advertised for sealed bids for the bonds therein mentioned to the amount of \$100,000.00, and are incurring great expense in advertising and in the preparation of the bonds; that bids will be received by them on the 30th of June, 1914, and that they threaten to and will sell and issue the same as they find purchasers for them unless restrained by the Court.

The bill then alleges that Chapter 250 of the Acts of 1914, is unconstitutional and void because it violates sec. 29 of Art. 3 of the Constitution of the State; the Declaration of Rights (Art. 23), and the Fourteenth Amendment of the Constitution of the United States. It further alleges that the special election held on the third Tuesday of April, 1914, in pursuance of said Act was not and could not be lawfully held under the provisions of the charter of the town (Act of 1910, Chapter 514, p. 998), as amended by the Act of 1914. Chapter 357, because no provision is made in either the original charter or said amendment thereof for a "registration of the legal voters of the" town; that for the same reason the defendants were not lawfully elected and do not compose the Mayor and Common Council of Mount Rainier, and that the result of the special election was due to votes cast by many persons who were not entitled to register or to vote at said election.

A preliminary injunction was granted as prayed, and the defendants answered, admitting the facts and that they intended to carry out the provisions of Chap. 250 of the Acts of 1914, except the averment that there was illegal voting at the special election, which they deny. They further deny that the Act violates the Federal or State Constitution or the Declaration of Rights; that the special election was illegal or that the defendants were not lawfully elected. The case was submitted for a final decree on the bill and answer, and this appeal is from the decree of the Court below perpetually enjoining the defendants from selling, disposing of or hypo-

theating any of the bonds provided for in the Act of 1914, and from incurring any expense chargeable to the town in connection with any effort to sell, dispose of or hypothecate said bonds, and requiring them to pay the costs of this suit.

There can be no doubt about the right of taxpayers of an incorporated town or city to proceed in equity to enjoin the municipal authorities from making a contract or incurring obligations which they have no lawful power to make or incur, and which, if made or incurred, will increase the burden of taxation. They constitute, says JUDGE ROBINSON in *Baltimore v. Keyser*, 72 Md. 106, "a special class, having a special interest in the subject-matter distinct from that of the general public." He cites the case of *St. Mary's Industrial School v. Brown*, 45 Md. 310, where "an injunction was held to be the proper remedy whenever it appears that municipal corporations or their officers are 'acting *ultra vires*, or assuming to exercise a power over the property of the citizen, or over corporate property or funds, which the law does not confer upon them, or where such unauthorized acts may affect injuriously the rights and property of the parties complaining.'" It is upon this principle that relief was granted in *Painter v. Mattfeldt*, 119 Md. 466.

As the plaintiffs are residents, taxpayers and owners of real estate in the town of Mount Rainier any obligation the town authorities may incur will necessarily affect them as taxpayers, and particularly is that so in this case, where, by the terms of the Act, the Mayor and Common Council are to determine in what streets, etc., the sewer and water mains are to be laid, and are required to impose the cost of the system upon the abutting owners, and where the improvements contemplated may therefore result in great additional burdens upon the defendants as owners of real estate within the corporate limits.

This brings us to the objection urged against Chapter 250 of the Acts of 1914, and in the view we take of the case it

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will not be necessary to consider the other grounds upon which relief is prayed.

The plenary power of the Legislature; the presumptions in favor of the validity of statutes, and the principle upon which courts are required to pass upon their constitutionality are clearly stated in *Painter v. Mattfeldt, supra*, where, after referring to the duty of courts to give effect to constitutional requirements, JUDGE BURKE said: "The Court will not declare an Act unconstitutional, because it is unwise or inexpedient, nor will it strike it down, because it will operate harshly upon persons affected by it. These are matters committed to the judgment of the law-making power. They are purely political, and are not reviewable by the Court.

Section 29 of Article 3 of the Constitution, which declares that "every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title," is mandatory, and while, as said by CHIEF JUDGE ALVEY in *State v. Norris*, 70 Md. 91, "this Court has ever been reluctant to defeat the will of the Legislature by declaring * * * legislation void, if by any construction it could possibly be maintained," it is our plain duty to do so where there is a clear infraction of this wise and salutary provision of the organic law, the purposes of which, we have said, are "to prevent 'Logrolling' legislation; to give the people general notice of the character of the proposed legislation, so they may not be misled; to give all interested an opportunity to appear before committees of the Legislature and to be heard upon the advisability of the proposed legislation; to advise members of the character of the proposed legislation, and to give each an opportunity to intelligently watch the course of the proposed bill; to guard against fraud in legislation, and against false and deceptive titles." *Painter v. Mattfeldt, supra*.

In the case of *Luman v. Hitchens Bros. Co.*, 90 Md. 14, CHIEF JUDGE McSHERRY said: "There are two things prohibited in the body of the Act under a title indicating a pur-

pose to prohibit but one thing; and that one thing is a wholly different thing from the two which are prohibited. The *title* relates to sales to *employees*; the *body* of the Act prohibits railroad and mining corporations from selling at all; and it also, without qualification, prohibits the designated officers from having any interest in any store, and from selling to *any* person any goods, wares or merchandise in the county. * * * Though the title need not contain an abstract of the bill, nor give in detail the provisions of the Act, it must not be misleading." In the case of *State v. Schultz*, 83 Md. 58, the Court held that the title must not be such as to divert attention from matters contained in the body of the act, and in *Painter v. Mattfeldt*, *supra*, the Court in holding the title of the Act deceptive and misleading, said though JUDGE BURKE: "Any one reading the title of this Act would naturally conclude that the 'ways and means' by which the road and bridge construction contemplated by it should be paid for would be derived from the proceeds realized from the issue of the bonds. * * * No one reading the title of this Act would for a moment suppose that the county would be subjected to large obligations and expense in excess of the one million five hundred thousand dollars for the completion of the work provided for." Another instance of a misleading title is found in the recent case of *State v. King*, 124 Md. 491.

In the case we are now considering the title declares that it is an Act to authorize the Mayor and Common Council of Mount Rainier to issue bonds for the purpose of constructing a sewer and water system; to condemn the land necessary for that purpose, and to levy taxes on the assessable property of the town to redeem the bonds and pay the interest thereon. whereas in the body of the Act the Mayor and Common Council are authorized and required to collect from the owners of property abutting on the streets, etc., in which the sewer and water mains are laid the amount of the bonds and interest. The words "assessable property of the town" clearly mean all property in the town liable to be assessed for the purpose

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Opinion of the Court.

of taxation, and any one reading the title or hearing it read would naturally suppose that the cost of the proposed improvement was to be borne by all taxpayers of the town. There is certainly no intimation in the title that the owners of property abutting on the streets in which the mains are located are to bear the entire burden. On the contrary, the words employed in the title express an entirely different purpose. The title of the Act is, therefore, not only deceptive and misleading, but is at variance with the body of the Act, and the Act is a plain violation of the constitutional provision referred to.

It was said by CHIEF JUDGE BOYD, in *Somerset County v. Pocomoke Bridge Co.*, 109 Md. 1: "It is well settled that it is not necessary, or proper, to strike down an entire Act because one provision is void, 'unless the provisions are so connected together in subject-matter, meaning or purpose that it cannot be presumed the Legislature would have passed the one without the other.'" The provision of section 7 of the Act of 1914 is so connected with the subject-matter, purpose and scheme of the Act that it cannot be presumed that the Legislature would have passed the Act without it. *Nutwell v. Anne Arundel County*, 110 Md. 667.

Assuming that the special election in April, 1914, is free from the objections *alleged in the bill*, as to which we express no opinion, it is obvious that the approval of the bond issue by the voters of the town cannot cure the defect in the Act of 1914, Chapter 250, and as the special election was held in pursuance of that Act it lacks the sanction of valid legislation.

It follows from what we have said that the decree of the Court below must be affirmed.

Decree affirmed, the costs to be paid by the appellants.

HEISE & BRUNS MILL AND LUMBER COMPANY,
A BODY CORPORATE,

vs.

GEORGE C. GOLDMAN, DAVID M. NEWBOLD, AND
NEWBOLD & NEWBOLD & SONS, INCORPORATED.

Agency vel non: question for jury.

It is not for a Court to determine the question of agency *vel non*, but to determine whether there is any evidence tending to prove agency; and if there is any such proof, although not full and satisfactory, it is the exclusive province of the jury to judge its weight. p. 559

Whether there be any evidence or not is a question for the judge. Whether it is sufficient evidence is a question for the jury. p. 559

Relations of principal and agent do not depend upon express appointment and acceptance, but may be implied from the words or conduct of the parties and circumstances. p. 559

Decided April 8th, 1915.

Md.]

Opinion of the Court.

Appeal from the Court of Common Pleas of Baltimore City. (DOBLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

J. Royal Tippet (with whom was *Richard B. Tippet* on the brief), for the appellant.

Arthur L. Jackson (with whom was *David M. Newbold, Jr.*, on the brief), for the appellees.

CONSTABLE, J., delivered the opinion of the Court.

There is but one exception in this record, and that arises from the action of the Court below in granting a prayer at the conclusion of the plaintiff's testimony, directing a verdict for the defendants, upon the ground that there had been offered no evidence legally sufficient to entitle the plaintiff to recover.

The action was in assumpsit and upon the common counts, and was for the purpose of collecting an unpaid balance due the appellant for building materials. The defendant, George C. Goldman, a building contractor, filed a special plea of discharge in bankruptcy, to which no replication having been filed, judgment by default whereof was entered for him. It was admitted in open Court by the appellees that David M. Newbold and Newbold & Sons, Inc., were, for the purposes of the case, to be considered identical.

The appellant produced George C. Goldman, who testified that in the spring of 1909 he entered into a verbal agreement with David M. Newbold to build, on land belonging to Mr. Newbold in West Baltimore, several houses. By

this agreement the title to the houses was to be transferred to Goldman, subject to a ground rent of thirty-six dollars per house for some of the houses and sixty dollars as to others; he was also to receive a bonus of three hundred dollars per house on some of the houses and four hundred per house on others. Mr. Newbold was also to loan him five hundred dollars per house on some of the houses and five hundred dollars per house on the others, if he should need it. After having made the agreement he asked for bids from the material men, representing that the properties were to be in his name, subject to ground rents. That before the appellant entered into a contract with him for materials the president of the appellant corporation had Mr. Newbold sign a paper guaranteeing the payment of its account to the extent of 50% on the first lot of houses to be built and 66⅔% on the second lot. The guarantee was as follows:

"Baltimore, April 6th, 1909.

"Mess. Heise & Bruns Company.

"Gentlemen: In consideration of your furnishing material, lumber and millwork to Mr. George C. Goldman for houses to be erected by him at Hollins and Smallwood Streets, I agree to guarantee said material, lumber and millwork as furnished for said buildings at prices agreed with George C. Goldman as follows: Each month's account to be closed by note or notes at four months, without interest, when said note or notes mature I have the option of renewal at four months with interest. If Goldman does not pay them I will *to the extent of fifty per cent., no more, my liability to be limited to the extent of fifty per cent. and no more.*

D. M. Newbold.

"N. B.—The part of the above paper which is underscored appears in the handwriting of Mr. D. M. Newbold."

The paper guaranteeing 66⅔% is to the same effect as the above.

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Opinion of the Court.

The bonus on each of the houses was paid by Mr. Newbold. The amounts under the 50% and 66 $\frac{2}{3}$ % guarantees were also paid by Mr. Newbold and charged against the amounts agreed to be loaned by him on the houses. So that at the time the suit was brought there was nothing due from Mr. Newbold to Mr. Goldman under the agreement between them; nor anything due the appellant by Mr. Newbold by reason of his guarantees. The bonus money was used by Mr. Goldman to pay off his weekly pay roll, including twenty-five dollars per week for himself. The loan money was used to pay the material men, sometimes directly paid by Goldman, at others by Newbold.

It was proved that leases for all the properties were made by Newbold & Sons, Inc., to George M. Maisel, a clerk in the office of Mr. Newbold, by four separate leases, the first dated July 9th, 1909, and the last June 20th, 1910. That none of this property was ever conveyed to George C. Goldman. Mr. Goldman testified that he first learned of the first lease by reading of it in the papers, and went to Mr. Newbold, telling him that since he had bought all the material the property should be in his name. Mr. Newbold replied to this: "It is all right as it stands." Under cross-examination, the witness testified that he understood this lease was simply formal, and never objected to the subsequent ones.

A large number of the houses were sold, the negotiations for the sales in some instances being carried on by Mr. Goldman and in others by Mr. Newbold. Several houses were taken by different material men in settlement of their accounts. The money received from the sales was credited on the account of Mr. Goldman. In February, 1912, a voluntary petition in bankruptcy was filed by Mr. Goldman, and in the list of unsecured creditors was the appellant for the amount due on a promissory note; and among the schedule of assets his interest in sixteen of the houses built under the agreement in this case, being all of those unsold at that time.

John F. Bruns, president of the appellant corporation, testified that after Mr. Goldman had interviewed him as to furnishing materials for the construction of the houses, he visited Mr. Newbold for the purpose of having him guarantee the payment of the whole account, having with him a prepared paper to that effect. Mr. Newbold refused to guarantee the whole account, but limited his liability to the extent of 50% on the first transaction and subsequently 66 $\frac{2}{3}$ % on the second transaction. This guarantee was satisfactory to Mr. Bruns, for he thought the leases were to be in the name of Mr. Goldman, and that fact would furnish ample protection to him for any amount not covered by the guarantee. Near the time of the completion of the second lot of houses, he learned from Goldman that the leases were in the name of Mr. Maisel, and went to Mr. Newbold and complained of the leases not being in the name of Goldman, and was told by Mr. Newbold that whenever a house was sold he would get the *pro rata* of his bill. At this time he refused to furnish any more material, unless Mr. Newbold paid the whole amount of the subsequent bills. This was agreed to and carried out by Newbold. Mr. Newbold asked that he take houses for his claim, but this he refused to do, although he did arrange with one of his employees for the purchase of one, and the proceeds were credited to Goldman's account. He also testified that Goldman had frequently dealt with his firm, and, at the time of this contract, was largely indebted to it. He also testified that the credit for this contract was extended to Goldman, and the account carried on the books in Goldman's name.

The only other witness was Herbert E. Keys, who testified that from April, 1910, to January, 1911, he was the agent on the property. Mr. Goldman took him out to the property, but Mr. Newbold paid him, so he thought he was working for Mr. Newbold. So long as Mr. Goldman was on the work he brought him his money every week when the workmen were paid off. Later he got his money at Mr. New-

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Opinion of the Court.

bold's office. He testified he sold six of the houses and got deposits on them. Some he turned over to Mr. Goldman and the others to Mr. Newbold. In the same way he collected and paid over rents. Mr. Newbold told him, after he had paid over forfeits to Mr. Goldman, that he should not turn over any more to Mr. Goldman, for Goldman did not have anything to do with the houses, but they belonged to him. He also told him Goldman had no interest in the houses.

The theory of the appellant is that the appellee is properly chargeable with these materials, on the ground that there is evidence from which the jury could find that Goldman was but the agent of Newbold, and that Newbold used him as a sham or straw man so as to escape liability on the contract made by him with the appellant. It is the undoubted rule of law of this State, and practically universal, that it is not for the Court to determine the question of agency *vel non*, but to determine whether there is any evidence tending to prove the agency, and if there is any such proof, although not full and satisfactory, it is the exclusive province of the jury to judge of its weight. "Whether there be any evidence or not is a question for the judge; whether it is sufficient evidence is a question for the jury." *Nat. Mech. Bank v. Nat. Bank*, 36 Md. 5; *York Co. Bank v. Stein*, 24 Md. 447; *Morrison v. Whiteside*, 17 Md. 452; *Henderson v. Mayhew*, 2 Gill, 393.

The relation of principal and agent does not depend upon an express appointment and acceptance thereof, but it may be implied from the words and conduct of the parties and the circumstances. *Rosenstock v. Tormey*, 32 Md. 169, 31 Cyc. 1217. In view of these principles it was the duty of the Court below, in considering the prayer, to assume the truth of the evidence of the plaintiff and determine whether there was any proof from which the jury could infer the relationship between Goldman and Newbold.

That the Court below determined this question correctly we have no doubt.

The testimony of Goldman clearly establishes his understanding of the relationship that was to exist between himself and Newbold. It does not import any idea that he was contracting for materials as the agent of Mr. Newbold. In fact, he distinctly represented to the appellant that he was not buying except on his own responsibility and for his own account. His true understanding is fortified by his acts when he was seeking relief in bankruptcy proceedings, as shown by the records of the U. S. Court, in that he admitted individual liability on the contract here sued on, and claimed an interest as owner in the properties in question. If the appellee did not carry out the terms of the agreement between them as to the title of the properties being placed in Goldman, Goldman could, no doubt, have had redress, but by his own testimony he showed it was not material to his interest where the title stood. As fast as the houses could be sold the conveyances were made and his account credited. The fact that the transfer was not made before the houses were completed could not operate to change their relationship into that of principal and agent—a relationship which, according to Goldman, was not at any time in contemplation. While it is true that the relationship will not be inferred from the fact that third persons thought it existed, it is, nevertheless, significant that the appellant did not consider the appellee as the principal. And this is so much the stronger, when we recall that the representative of the appellant requested from the appellee a guarantee of the whole account, and was satisfied with a partial one; and this for the reason that he was satisfied that Goldman was operating upon his own account. Of course we are not overlooking the principles applying to one dealing as if for himself, but in reality for an undisclosed principal. So long as he thought the title was in Goldman he regarded Goldman as the one liable to him, but when he discovered otherwise, he then attempted to make Newbold liable not only for the portion which he had expressly limited his liability to, but for the whole account, on

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the theory that Goldman was his agent, with authority to bind him. The fact that the appellant refused after his discovery of the lease to furnish any more materials until the appellee agreed to pay for them, lends no force to the position of the appellant, for by then the appellee had a large amount tied up in the operation and it was necessary for him to have it completed in order to reimburse himself. Also the fact that the appellee told Keys, the agent on the ground, that the properties belonged to him and not to pay any money derived from the properties to Goldman, does not show anything more than that he regarded the properties his until he and Goldman had settled their accounts.

The appellant has cited and relies for its position upon four cases—one a Maryland case and three from other jurisdictions. The Maryland case is *Swindell v. Gilbert*, 100 Md. 399. There the recovery was based upon the theory that the architect, supervising the erection of a building, was the agent of the owners, and there being evidence that he had expressly stated to the material men that the owners would pay if the contractor did not, and the material men taking orders on that condition, it was held that the evidence was properly submitted to the jury to find whether he was the authorized agent of the owners. In the opinion, this Court, in dealing with the question of whether the contractor, who actually gave the orders, was actually purchasing the material on his own account, or was simply giving orders for the owners, said: "Here was evidence tending to show that Flaggs (the contractor) was a nonentity in the business, was ignored in the purchasing of the material and in the payments made therefor; and also in the changes of the amounts of material, and the whole matter apparently left in charge of the appellants or their agent. And if the jury believed this, they might have found that Flaggs was in fact only a figurehead." And the Court goes on to say, that if the jury found the contractor to be only a sham and that not he, but the architect, made the contract and conducted all the deal-

ings, and the owners accepted the benefit of his acts and made payments according to the architect's arrangements, with knowledge thereof, that from these facts, unexplained or uncontradicted, the jury could have found the agency of the architect. How different from the facts of the present case. There is no evidence whatever in the matter of the contract of Goldman with the appellant that he was ignored or overridden in the least. He was the only person the appellant consulted or looked to except as to the guarantee. He was not treated as a figurehead in the sale of the houses, for on every sale his account was credited with the purchase money.

The other cases cited need not be particularly referred to, as they are authorities emphasizing the principle, heretofore referred to, that agency can be implied from the circumstances and the acts of the parties, and that the Court is to only pass upon whether there is any evidence tending to show agency and the jury to determine the weight to be given the evidence, and are totally different from the facts of this case.

Being of the opinion that there was no evidence tending to show an agency, we will, therefore, affirm the judgment.

Judgment affirmed, with costs to the appellees.

Md.]

Syllabus.

THEODORE A. K. HUMMELSHIME, WARD M.
EICHELBARGER AND HAROLD
B. HUMMELSHIME.

vs.

STATE OF MARYLAND.

*Conspiracy: bribery; evidence of detectives. Letters: mailing
of—; letter chutes.*

In a prosecution for unlawful conspiracy, if the concerted action upon the part of the traversers is admitted (expressed), the issue remains whether their conduct was actuated by innocent motives or by unlawful purposes. p. 566

That is a question for the jury, not reviewable by the courts. p. 566

In the case of crimes, where an essential element is the want of consent of the individuals against whom they are committed, the instigation of the crime by the person to be affected is a defense to the prosecution. p. 570

But this principle does not apply to the case of the prosecution of public officers for an alleged conspiracy to demand a bribe for official action. p. 570

In this State, the jury are the judges of both law and fact in criminal cases. p. 570

The fact that the proposal of a bribe to influence certain members of a city council originated with a detective who was employed to investigate their official conduct, does not exempt from prosecution public officials who unlawfully conspire to demand a bribe to influence their own action as city councilmen. p. 571

Where there is a conflict of evidence as to how the bribe originated, it is a question for the jury. p. 571

Syllabus.

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Where it is a question of the mailing of a letter, testimony may be given as to whether the mail chute into which it had been placed was connected with a letter box on the lower floor.

p. 567

In a trial for a criminal conspiracy to bribe city officials, the defendants have the right to ask, as reflecting on the bias or interest of a particular witness, whether he is one of those who promoted the investigation.

p. 567

But a general inquiry as to the names of the citizens who were instrumental in having the detective sent to investigate the officials is an irrelevant one.

p. 567

Decided March 2nd, 1915.

Appeal from the Circuit Court of Allegany County.
(KEEDY, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

George Lewis Eppler and Archibald A. Young, for the appellants.

Albert A. Doub and Edgar Allan Poe, the Attorney-Generay, for the appellee.

URNER, J., delivered the opinion of the Court.

The appellants were convicted in a trial by jury in the Circuit Court for Allegany County upon an indictment which charged them with having unlawfully conspired to demand from a certain Elmer J. Miller the sum of eight

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hundred dollars for the purpose of corruptly influencing two of the accused in the performance of their official duties as members of the City Council of Cumberland, the sum mentioned being intended as a bribe to secure the votes of the two councilmen in favor of the payment of a claim against the municipality, held by the firm of Merrill Ruckgaber Company, in the amount of eight thousand dollars. A brief preliminary statement of the circumstances under which the prosecution developed will facilitate our discussion of the questions raised by the record.

In August, 1914, some persons, undisclosed by the proof, acting through Mr. David A. Robb as their attorney, engaged the William J. Burns Detective Agency to investigate the municipal administration of Cumberland, and particularly the official conduct of Dr. A. K. Hummelshime and Mr. Ward M. Eichelberger, two of the members of the City Council. The agency detailed for the investigation a detective by the name of Elmer J. Miller. It was arranged to have him appear in Cumberland in the pretended capacity of a representative of the Merrill-Ruckgaber Company, a firm employed in the construction of the dam for the new City water supply, and whose claim for a balance of \$8,000.00 on account of that work remained unpaid. The consent of the firm was obtained for Miller to assume the name of Albert Ruckgaber, one of its members, who was not known in Cumberland, and to confer with the councilmen ostensibly for the purpose of securing a settlement of the claim. The detective arrived in Cumberland on the last day of August. From the first to the sixth of September he had a series of interviews with the appellants, which were held with them separately, but, according to his testimony, were connected and sanctioned by their co-operation, and culminated in a proposition submitted to him by Harold B. Hummelshime, son of the councilman, that eight hundred dollars be paid in advance for the votes of his father and Mr. Eichelberger in favor of the allowance of the Merrill-Ruckgaber claim by the City Council, with the understanding that the money was to be refunded

in the event that the motion for the payment of the claim should be defeated. The defendants do not deny that they had interviews with Miller, under the belief that he was a member of the claimant firm, or that a bribe of \$800.00 for the votes of the two councilmen was discussed and agreed upon, but they testified that he originated the proposal and that they entertained it only with the object of securing his conviction for attempted bribery. It was planned that the money should be delivered in the City of Washington, and Miller met Harold B. Hummelshime there, by appointment, for that purpose, but no payment was actually made, except of the sum of ten dollars on account of the latter's expenses, as the detective concluded that he had succeeded in providing sufficient evidence for a successful prosecution of the defendants upon the present charge.

The primary fact of concerted action on the part of the defendants in reference to the proposed bribe being admitted, the real issue in the case was whether the conduct of the accused was actuated by innocent motives or by an unlawful purpose. As the determination of that vital question was exclusively within the province of the jury, and is not subject to review by this Court, there is no occasion for us to recite the evidence offered by the prosecution and defense in support of their respective theories.

In our examination of the record we have been unable to find any prejudice to the appellants in any of the rulings. The evidence adduced by the State was kept strictly within its due and proper bounds, and adequate opportunity was afforded for the development of the defense.

The first and second bills of exceptions show that the detective Miller, after testifying to his first interview with Dr. Hummelshime, was asked to refresh his recollection from verified copies of his notes as to what happened the next day. Upon objection being made the Court ruled that the witness might use the notes simply to aid his memory as to when the next conversation occurred. The inquiry was not pursued and the notes do not appear to have been used for

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any purpose, and these exceptions, therefore, need not be further considered.

The third exception was taken to the overruling of an objection to a question propounded to the same witness as to whether a mail chute, in the Woolworth Building in New York, in which he had placed a letter addressed to Dr. Hummelshime, was connected with the mail box on the lower floor. This was a proper fact to be proven in that connection, and the same question had already been asked and answered in the affirmative without objection.

On cross-examination the detective was asked who was employing the Burns Detective Agency for the Cumberland investigation. An objection to this question was sustained, but when it was changed in form so as to inquire whether any of several designated persons had anything to do with the employment of the agency, the objection was overruled. There is no suggestion that the proper presentation of the defendant's case depended upon a knowledge of the identity of the persons by whom the services of the detective agency were secured. The defendants were, of course, entitled to ask, as reflecting upon the interest or bias of a particular witness, whether he was one of those who had promoted the investigation, and this right was fully protected by the Court's ruling. But a general inquiry as to the names of the citizens who were instrumental in having the detective sent to Cumberland could not aid the jury in determining the guilt or innocence of the accused upon the specific charge preferred.

By the fifth bill of exception it appears that the detective was asked on cross-examination whether he investigated any other members of the City Council. This question he declined to answer. He was then asked to state his reason for this refusal, but an objection was here interposed and sustained. The next question propounded was whether it was necessary to investigate any other person in connection with the water system. This was also disallowed, and forms the subject of the sixth exception. There can be no doubt as to

the propriety of these rulings, as the questions were plainly irrelevant to the issue before the jury.

The seventh exception was reserved to the action of the Court in overruling an objection to a question asked the witness Miller as to whether it is usual for detectives to act under assumed names in making investigations like the one in which he was engaged in this instance. His answer was in the affirmative. It was doubtless the object of this inquiry to support Miller's credibility by showing that he was not resorting to any unusual methods, for the kind of service in which he was engaged, when he concealed his identity in the manner described. The question was permissible for such a purpose, and in any event we do not see how the answer could have caused the defendants any injury.

In the course of the cross-examination of Mr. David A. Robb, who had testified in chief for the State, he was asked, as shown by the eighth bill of exception, to give the names of the citizens he represented in employing the detective agency. The Court ruled in effect that the question could not be asked generally, but that it would be allowed for the purpose of disclosing the names of any persons who were alleged by the defendants to be engaged in a conspiracy to have them wrongfully prosecuted. This position was later modified, as indicated by the ninth bill of exceptions, by a ruling that Mr. Robb could not be asked whether a designated person was one of those who helped to employ the detective agency, but that if the person named were called as a witness for the State, it might be permissible to question him on that subject. The opportunity thus suggested was afterwards presented and was accepted by the defense. Under such circumstances the refusal of the Court to require Mr. Robb to divulge the names of his clients was neither injurious nor improper.

When Dr. Hummelshime was testifying on behalf of the defendants he was asked in chief to state what his son had reported when he returned from his interview with "Ruckgaber" in Washington. An objection to this question was

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sustained, and forms the basis of the tenth and last exception. It was testified by Harold B. Hummelshime that upon his return to Cumberland he related to his father and Mr. Eichelberger what had transpired on the occasion just mentioned. His version of the interview in question did not differ in any of the essential details, from that of the detective. It seems clear, therefore, that if it be assumed, though we do not so decide, that the inquiry embodied in this exception would have been proper, there was no prejudice to the defense in the refusal to permit Dr. Hummelshime to repeat a statement made by his son with which the proof of the State substantially agreed.

It appears from the record that after all the evidence had been offered, and before the argument to the jury was begun, Mr. Doub, the Special State's Attorney in charge of the case, was excused at his request, for about fifteen minutes, and that during this interval JUDGE KEEDY imposed sentence upon a prisoner who had been convicted of murder in the second degree, and in that connection expressed at some length the views of the Court as to the insufficiency of one of the defenses upon which the prisoner had relied in his trial as against a charge of murder in the first degree. These remarks were made in the presence of the jurors impaneled in the pending case, several of whom had served on the jury by which the verdict in the homicide case was rendered. It is urged that the general effect of the statements thus made by the trial judge was harmful to the interests of these defendants. No exception was taken to the expressions of the Court, and no suggestion appears to have been made at the time that they might have a prejudicial influence. The objection now urged is therefore not a proper subject of decision on appeal. *Mitchell v. State*, 115 Md. 367; *Cross v. State*, 118 Md. 672.

The argument on behalf of the defendants was mainly directed to the proposition that even if the theory of the defense be disregarded and the evidence adduced by the State be accepted as true, the case does not admit of a con-

viction because it shows that the defendants were enticed by the detective into the commission of the offense with which they are charged. This question is not presented by any exception in the record and is not shown to have been raised or ruled upon in any way at the trial. The objection urged as to the sufficiency of the evidence to prove the conspiracy alleged in the indictment is not open for our determination. In this State the jury are the judges of both the law and the facts in criminal cases, and we have no authority to disturb a judgment based upon their verdict in the absence of reversible error in the rulings of the Court. *Jessup v. State*, 117 Md. 119; *Garland v. State*, 112 Md. 83; *Dick v. State*, 107 Md. 17; *Luery v. State*, 116 Md. 284; *Lanasa v. State*, 109 Md. 602. If however the question were properly before us for decision, we could not adopt the theory which the defendants have advanced. The principle they invoke is one which has been applied in some instances where an alleged offense against property rights has been instigated by the person to be affected, whose consent thus given eliminates one of the essential elements of the crime. The decisions upon the subject are collected in notes to *State v. Smith*, (152 N. C. 798), 30 L. R. A. N. S. 946, and *Connor v. People* (18 Col. 373), 23 L. R. A. 341. In the note to the first cited case it is said: "In larceny and other crimes where a want of consent of the individual affected is an element of criminality, instigation or consent to the crime is a defense to prosecution, if it negatives one of the essential elements of the crime charged, though not otherwise." This doctrine is clearly inappropriate to a prosecution of public officers for an alleged conspiracy to demand a bribe for their official action.

In *People v. Liphardt*, 105 Mich. 80, where a member of a board of education was indicted for receiving a bribe, it was held to be no defense that the prosecuting witness encouraged another member of the board to advise the defendant that the witness would accept an offer from him to sell his vote, and that the witness in conjunction with the

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mayor and the police made plans to entrap and detect the defendant in receiving the bribe thus proposed. To the same general effect is the case of *Rath v. State*, 35 Tex. Crim. Rep. 142, where the defendant was being prosecuted for offering to bribe an officer, and it was held to be immaterial that the officer made the suggestion of bribery.

If, therefore, in the case before us, it was undisputed that the proposal of a bribe to influence the votes of the councilmen originated with the detective who had been employed to investigate their official conduct, we could not for that reason sustain the defendant's claim of exemption from prosecution. But the testimony of the detective was that while he indicated his willingness to pay "any expenses" connected with the passage by the Council of the account in which he was ostensibly interested, the proposition for the payment of money as a bribe emanated from the other parties to the negotiations. The evidence offered by the defendants was to the contrary effect, but the conflict of proof upon this point presented an issue which the jury alone had the right to decide, and this consideration is sufficient in itself to prevent the acceptance of the theory relied upon as a ground of immunity.

As we have found nothing in the rulings of the Court below to justify a reversal, the judgment must be affirmed.

Judgment affirmed, with costs.

W. D. NYDEGGER, GRANVILLE G. BIXLER AND
EARNEST WESTFALL

vs.

GEORGE N. GITT.

Leases: construction; in addition to rent, money paid for improvements. Written contracts: construction; parol evidence. Equitable pleas: jurisdiction of law courts not extended.

Besides the other terms and conditions for the payment of rent, a lease by the covenant upon which a right of action was based was as follows: "at the expiration of this lease to pay to the said party of the prst part the sum of seven hundred and fifty dollars in cash for the purpose of converting the room into a suitable storeroom." p. 576

It was further agreed and understood, that if the parties of the second part (the lessees) became embarrassed or made an assignment for the benefit of creditors, or should be declared bankrupt, or should be sold out by sheriff's sale, then the rent for the balance of the term, including the above sum of seven hundred and fifty dollars (\$750) cash, to be paid at the expiration thereof, to at once become due and payable, as if by the terms of the lease it had all been payable in advance, and should first be paid out of the proceeds of such assignment, bankruptcy or sale, any law, usage or custom to the contrary notwithstanding: *Held*, that the conversion of the premises at once into a suitable storeroom was not a condition precedent to the payment of the money. pp. 576-577

Where the terms and meaning of a written contract are clear and explicit, parol proof is not admissible to explain or vary the agreement. p. 577

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The statute allowing equitable pleas does not enlarge the jurisdiction of courts of law, so as to confer upon them the power of cancelling or reforming contracts. p. 578

Decided April 8th, 1915.

Appeal from the Superior Court of Baltimore City.
(BOND, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Daniel S. Sullivan, for the appellants.

Alfred S. Niles and Chester F. Morrow, for the appellee.

BRISCOE, J., delivered the opinion of the Court.

The plaintiff brought this suit against the defendants, in the Superior Court of Baltimore City, to recover certain rentals for leased premises, according to the covenants of the defendants in a lease dated the 6th day of March, 1909.

The lease is under seal, filed as the cause of action in the case, and is set out in part, in the plaintiff's declaration.

The plaintiff is the owner of certain premises known as No. 29-31, Baltimore street, in the Borough of Hanover, Pennsylvania. and in consideration of the covenants contained in a deed, leased a certain portion of the lot and premises mentioned therein to the defendants for the purpose of operating a moving picture show, vaudeville or any theatrical purpose, for the term of five years from the first day of June, 1909.

The covenant in the lease as to the payment of rent and the one here in dispute is as follows: "Said parties of the second part agree to pay as rental for the same, *i. e.*, for

the premises above mentioned) the sum of one hundred dollars per month, payable in advance on the first day of each month and every month beginning June 1st, 1909, and at the expiration of this lease to pay to the said party of the first part the further sum of seven hundred and fifty dollars (\$750), in cash for the purpose of converting the room into a suitable store room."

It was also agreed, as provided by the lease, that if the parties of the second part become embarrassed or make an assignment for the benefit of creditors or should be declared bankrupt or are sold out by sheriff's sale, then the rent for the balance of the term, including the above sum of seven hundred and fifty dollars (\$750), cash, to be paid at the expiration thereof, shall at once become due and payable as if by the terms of the lease it were all payable in advance and shall first be paid out of the proceeds of such assignment, bankruptcy or sale, any law or custom to the contrary.

The declaration avers, that the defendants, in accordance with the provisions and covenants in the lease, entered upon the premises, and held the same for the period of five years. the term provided by the lease, and that the plaintiff performed all the conditions and covenants, as required by the lease, but the defendants failed upon demand at the expiration of the lease, and continue to refuse to perform the term of their covenant, to wit, the payment of the sum of \$750, in cash, for the purpose of converting the room so demised into a suitable store room.

The questions in the case arise upon the defendant's demurrer to the plaintiff's declaration, which was overruled by the Court below, and to the plaintiff's demurrer to five of the defendants' pleas, which denied their liability to the plaintiff under the terms of the lease.

The plaintiff's demurrer to the defendants' five pleas was sustained, and upon the withdrawal of the defendants' first plea, a judgment by default for want of a plea and affidavit of defense, was entered, upon motion of the plaintiff, against the defendants. Whereupon damages were assessed by the

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Court, and from a final judgment in favor of the plaintiff, the defendants have taken this appeal.

The real question in the case is whether the facts set out in the defendants' five pleas, constitute a legal bar or a good defense to the plaintiff's claim, and demand as specially set out in his declaration.

It is apparent, without stating the pleadings, in detail, that the plaintiff bases his right of recovery upon the covenant in the lease wherein the defendants agreed and promised, "at the expiration of this lease to pay to the party of the first part (the plaintiff here) the sum of seven hundred and fifty dollars in cash for the purpose of converting the room into a suitable store room."

The defenses relied upon to defeat the plaintiff's action are stated by the defendants' pleas.

The second, third, fourth and fifth pleas, assert, in substance, as stated by the appellee in his brief, that the plaintiff has not converted the premises leased into a suitable store room, that he has refused and still refuses to do so, that by making a new lease of the premises he has disabled himself from doing so, and that either by virtue of the language of the lease itself or by reason of an understanding or agreement made "at and before the execution of said deed" defendants are relieved from fulfilling their covenant because of such failure and refusal to so apply the money.

The sixth plea is on equitable grounds and in effect states, that the defendants are not liable under the lease because the lease did not represent the intention of the parties at the time of its execution.

The main question, then, on the appeal, is whether the defendants' pleas, as pleaded, constitute a good and valid defence to the plaintiff's right of action, under his declaration.

We think, the Court below was clearly right in sustaining the demurrers to each of these pleas and in holding that they did not afford a good defence to the plaintiff's claim under the declaration.

The covenant as set out in the lease, is a clear, plain and definite promise to pay the plaintiff a certain sum of money for an expressed and admitted consideration and for a fixed purpose, at the expiration of the lease. The covenant of the lease, whereon the right of action is based, is as follows, "at the expiration of this lease to pay to the said party of the first part the sum of seven hundred and fifty dollars in cash for the purpose of converting the room into a suitable store room."

The declaration avers and the demurrer admits that under the provisions and covenants in the lease, the defendants entered upon the premises and held the same for a term of five years beginning on or about the first day of June, 1909, and ending on the thirty-first day of May, 1914, and that at the expiration of the lease the plaintiff had performed all the conditions and covenants of the lease, that were necessary to entitle him to recover the sum of money promised to be paid for the purposes set out in the lease.

The plaintiff, it will be seen, agreed under the lease, to build and construct the room, according to certain plans making such changes in the lobby, according to a sketch, submitted by the defendants, for the purpose of operating a moving picture show, vaudeville, or any theatrical purpose, for the term of five years from the first day of June, 1909, and the additional sum of \$750 covenanted to be paid, was evidently for the purpose of securing the plaintiff against the expense of having to remodel the premises, and was reserved as a part of the rent, payable at the termination of the lease, and for the benefit of the lessor.

One of the provisions of the lease which is a part of the declaration is absolutely consistent with this construction. It is as follows: "It is further agreed and understood, that if the parties of the second part (the lessees) become embarrassed or make an assignment for the benefit of creditors, or should be declared bankrupt, or are sold out by sheriff's sale, then the rent for the balance of the term, including the above sum of seven hundred and fifty dollars (\$750)

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cash, to be paid at the expiration thereof, shall at once become due and payable, as if by the terms of the lease it were all payable in advance, and shall first be paid out of the proceeds of such assignment, bankruptcy or sale, any law, usage or custom to the contrary notwithstanding."

"The said parties of the second part shall have the privilege of sub-letting or transferring this lease, but such sub-letting or transfer shall not release them from any liability hereunder."

The defence sought to be set out by the defendants' second, fourth and fifth pleas to the effect, that the plaintiff had not converted the premises leased into a suitable store room and had refused so to do, did not furnish a sufficient answer to the plaintiff's claim under the covenant in the lease. The conversion of the premises at once into a suitable store room, was not a condition precedent to the payment of the money.

The defendants had surrendered the premises, the lease had expired, and they had no further interest or concern therein, and could not be injured by the failure of the plaintiff to appropriate the money to improving the premises. The demurrer to these pleas were properly sustained.

By the third plea a different and inconsistent parol agreement from the terms of the lease here in question and alleged to have been made, "at and before" the execution of the deed of lease, was sought to be set up.

As the meaning and terms of the written lease, under seal, in this case, are clear and explicit as to the payment of the money, under the covenant of the lease, the well settled rules of law, as to the admission of parol proof, to explain the agreement of the parties as to matters upon which a contract is obscure and silent has no application. *Pearl Hominy Co. v. Linthicum*, 112 Md. 32.

While the legal principles established by the cases cited and relied upon by the appellants are unquestioned and beyond dispute, they clearly do not apply to this case.

The demurrer to this plea was, therefore, properly overruled.

The sixth plea, upon equitable grounds, was not a good plea, and was no legal defence to the action.

It has been settled by repeated decisions of this Court, that the statute allowing equitable pleas, did not enlarge the jurisdiction of courts of law, so as to confer upon them the power of cancelling and reforming contracts. *Taylor v. State*, 73 Md. 208; *Conner v. Groh*, 90 Md. 684; *Whitaker v. McDaniel*, 113 Md. 388.

The covenant of the defendants under the lease in this case, was a clear and definite covenant to pay a certain sum of money at a certain time for a designated purpose, as stated in the lease, and the pleas do not present a legal defence to the plaintiff's action, under the declaration in the case.

In *Wright v. Irwin*, 33 Mich. 32, a case somewhat in point, the Court, said: Wright for an expressly admitted consideration promised to pay the company or bearer a certain sum of money in definite instalments at specified times and he promised nothing else. There is no contingency, no alternative, no uncertainty. The passage superadded goes to explain how the party absolutely entitled to receive the money was expected to employ it; that is all, and it served in no manner to impair the right to exact the money promised at the time set for payment, so as much money payable by the provisions of a promissory note."

And to the same effect are the following cases: *Beatty v. Western College*, 177 Ill. 280; *Treat v. Cooper*, 22 Maine, 203; *Clanin v. Easterly Harvesting Co.*, 118 Ind. 372; *Nokes v. Gibbon*, 3 Drewry, 681; 4 *Am. & Ency. of Law*, 89.

It follows from what we have said, in dealing with the rulings on the demurrer to the pleas, the Court committed no error in overruling the demurrer to the plaintiff's declaration.

For these reasons the judgment will be affirmed.

Judgment affirmed, with costs.

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Syllabus.

GEORGE A. COX

vs.

- SAMUEL REVELLE, JAMES W. REVELLE AND
WILLIAM J. REVELLE.

Oyster laws: policy; Chapter 711 of Acts of 1906. Eminent domain: oyster leases from State; condemnation; public use; restricted to citizens of county. Police regulations: not within prohibition of Constitution. Courts and Acts of Assembly.

The intent and policy of Chapter 711 of the Acts of 1906 was that natural oyster beds or bars should not be subject to lease for private use, but should be reserved as public oyster fisheries for use in common by the people of the State, under suitable regulations and license. p. 587

Leasehold interests acquired from the State are as completely subject to condemnation for public use as titles derived from any other source. p. 584

Police regulations with respect to such estates do not cause any impairment within the meaning of the Federal Constitution. p. 584

With the policy of legislation regarding the disposition of the oyster grounds the courts have no concern; the sole authority to deal with that subject is vested in the Legislature. p. 586

Chapter 265 of the Acts of 1914 amended Chapter 711 of the Acts of 1906, by providing a method by which, upon petition alleging that five or more acres of natural oyster beds or bars had been excluded from the surveys of natural beds, filed in the Circuit Court nearest the area in question, the same should be heard in the said court, before a jury (unless a jury trial was waived by all the parties), with the right to appeal to the Court of Appeals; the Act provided for the condemnation of any natural grounds or beds that might so be found wrongfully excluded; the law specially safeguarded the rights and in-

terests of lessees under leases from the State, in existence at the time the Act of 1914 went into effect, and provided against the divesting of those rights until compensation could be awarded therefor in the condemnation proceedings: *Held*, that in view of the provisions of the Act protecting the outstanding rights of the lessees, the Act was not in violation of section 40 of Article 3 of the Constitution, prohibiting the taking of private property for public use without just compensation. p. 586

Under the provisions of Chapter 711 of the Acts of 1906, certain areas had been leased to private parties for the purpose of oyster farming; the validity of the lease had been attacked by proceedings at law, but the attack was unsuccessful in the lower court, and on appeal the lower court was sustained; Chapter 265 of the Acts of 1914 provided new definitions of what were natural bars, and provided new proceedings for the legal determination of the questions: *Held*, that in proceedings under the latter Act, former judicial findings under the Act of 1906, regarding the same area, could not be pleaded as *res adjudicata*. p. 588

Courts have the authority to determine whether the use for which it is proposed to take private property, under the power of eminent domain, is public in its nature; but when that inquiry is answered in the affirmative, the question of the propriety of exercising that power is exclusively in the legislative discretion. p. 588

The taking of oysters by the public, under license of the State, from lands and waters subject to its ownership and control, is undeniably a public use. p. 587

But for such a use to be public, it is not necessary that every natural oyster bar should be open to the public generally; the right may be validly restricted to the citizens of the county within whose territory the fishery is located. p. 587

Decided April 8th, 1915.

Appeal from the Circuit Court for Somerset County.
(PATTISON, C. J., and STANFORD, J.)

The facts are stated in the opinion of the Court.

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The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Wm. H. Maltbie and Alonzo L. Miles (with whom was *H. Fillmore Lankford* on the brief), for the appellant.

Geo. Whitelock and W. Thomas Kemp (with *Whitelock, Deming & Kemp* and *Henry J. Waters* on the brief), for the appellees.

URNER, J., delivered the opinion of the Court.

The Board of Shellfish Commissioners, acting under authority conferred by Chapter 711 of the Acts of 1906, leased to the appellant, on May 20, 1912, for the term of twenty years, a lot of ground in the bed of Manokin River, in Somerset County, to be used for the purposes of oyster culture. It was the intent and policy of the law that natural oyster beds or bars should not be subject to lease for private use, but should be reserved as public oyster fisheries for use in common by the people of the State under suitable regulation and license. The land demised to the appellant had originally been classed as ineligible for leasing, as the investigation and survey of oyster grounds for which the Act made provision had officially shown it to be included in one of the areas designated as natural beds or bars. This ascertainment, however, was later reviewed by the Circuit Court for Somerset County, upon a petition by residents, as authorized by the statute, and the lot in question, as part of a larger tract, was determined to be "barren bottom" and therefore available for leasing, and the report and plat of the survey were accordingly amended. By the terms of the law, as it then existed, such an adjudication was final. It was about four years after the survey was thus revised that the appellant's lease was executed.

In August, 1914, the appellees filed a petition in the Court below alleging that the ground leased to the appellant was natural oyster bar and praying that it be so declared. This action was taken by virtue of Chapter 265 of the Acts of

1914, which amended the Act of 1906 by providing, in part, by Section 94B, that: "Three or more residents of this State may at any time before January 1, 1915, file a petition in writing alleging that five or more adjacent acres of natural beds or bars situated in the Chesapeake Bay outside county waters, or one or more acres of natural beds or bars within the territorial limits of any county of this State, to be described in said petition, have been excluded from the surveys or re-surveys of natural beds or bars of this State, such petition to be attested by the several oaths of the petitioners, and to be filed in the Circuit Court for the county in which, or nearest to which, the area in question is located." The Shellfish Commissioners, and the lessees, if any, of the disputed ground, are required to be made defendants, and after summons and due opportunity to answer, the Court is authorized and directed to "proceed promptly to hear all evidence adduced by the parties" and to "decide whether the area described in said petition is or is not a natural bed or bar as defined in Section 83, and judgment shall be entered accordingly." Section 94B continues: "The hearing in said Circuit Court shall be before a jury, unless jury trial be waived by all parties, in which event the hearing shall be before any judge or judges of said Court. An appeal to the Court of Appeals of Maryland may be taken by either party to said case from the judgment of said Circuit Court within thirty days thereafter, and the Court of Appeals shall have power to review all questions of fact or law involved. If the final decision shall be that the area in question is a natural bed or bar, amended plats shall be made and copies filed as provided in Section 94A."

A further amendment, contained in Section 94C, enacts that: "The rights and interests of lessees under leases outstanding and in force at the time of the passage of this Act (April 3, 1914) covering areas within the limits of natural beds or bars which may be established by the resurveys provided for by Section 94A, or by proceedings taken under Section 94B, and the oysters belonging to such lessees, located

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on such areas, shall be condemned by the State of Maryland for the use of the public."

To the petition of the appellees the Board of Shellfish Commissioners filed an answer neither admitting nor denying the allegations as to the character of the ground leased to the appellant, but demanding strict proof. The appellant, by his answer, denied that the lot embraced in his lease was natural bar, and relied upon the previous finding of the Court on that subject as the basis of a plea of *res adjudicata*. In support of the latter theory of defense the answer alleged that in November, 1912, a bill of complaint was filed in the Circuit Court for Somerset County in which the present petitioners, with others, were plaintiffs, and the present respondent was one of the defendants, and in which the allegation was made that the area found by the Court in the former proceeding to be barren bottom was in fact natural bar and the judgment to the contrary had been obtained by fraud and, together with the lease in controversy, should for that reason be set aside, and a decree passed to that end was reversed by the Court of Appeals and the bill dismissed, in *Cox v. Bennett*, 123 Md. 356, whereby the prior determination as to the leasable nature of the area was left in full force and effect. The answer also averred that the Act of 1914, which permitted the action now pending, is in conflict with Section 10 of Article 1 of the Constitution of the United States which prohibits State legislation impairing the obligation of contracts, and that it likewise violates Section 40 of Article 3 of the Constitution of Maryland which forbids the enactment of any law authorizing private property to be taken for public use without just compensation being first paid or tendered.

The petitioners demurred to the lessee's answer in so far as it set up the defense of former adjudication and the constitutional objections we have noted. The demurrer was sustained, and the case having proceeded to trial upon the question of fact raised by the pleadings as to whether the leased land was a natural bed or bar, a verdict was rendered in the affirmative upon that issue, and a declaratory judgment to

the same effect was duly entered. In the course of the trial two exceptions were reserved by the lessee, one relating to the admission of evidence and the other to the action of the Court on the prayers. The objections presented in this form were identical with those which had been overruled on demurrer.

The defense on constitutional grounds will be first considered.

It is entirely clear that in merely providing for a re-opening of the investigation as to the nature of the ground leased by the State to the appellant, the Act of 1914 does not impair the obligation of their contract. The judgment entered in the proceeding which the Act allowed for the purposes of such an inquiry is simply a formal declaration as to an ascertained condition. It makes no reference whatever to the existing lease. Notwithstanding such a determination the law recognizes the contractual rights of the lessee to their full extent. The interests created by the lease are given the same consideration that any other property is entitled to receive at the hands of the State. The lot demised having been found to be a natural oyster bar, provision is made for its condemnation for public use upon the distinct theory that the adjudication as to its real nature has not impaired or affected the vested estate of the lessee. In directing the acquisition of such a leased lot the Act expressly declares, in Section 94C, that: "No right, interest or property" of the lessee "shall be divested until the compensation awarded in such condemnation proceedings" * * * has first been paid. The appellant's contractual rights are thus duly regarded and protected by the law, and are required to yield only to the sovereign power of eminent domain.

It is, of course, not disputed that a leasehold interest acquired from the State is as completely subject to condemnation for public use as a title derived from any other source, or that the exercise of the power with respect to such an estate does not cause an impairment of contract within the meaning of the Federal Constitution. *Long Island Water*

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Co. v. Brooklyn, 166 U. S. 685; *West River Bridge Co. v. Dix*, 6 Howard, 507; *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674; *St. James Church v. B. & O. R. Co.*, 114 Md. 442; *Turnpike Road v. Railroad Co.*, 81 Md. 248; *B. & H. Turnpike Co. v. Union R. Co.*, 35 Md. 224. But it is urged that the Act of 1914, in authorizing proceedings like the one before us, directed the ascertainment of natural beds and bars to be made according to a specified standard which is different from the one applied in the original survey. This contention has reference to the fact that the Act of 1906 contained no definition of such areas, while the Act of 1914, by an amendment of Section 83, provides that the term "natural beds or bars" shall be construed to mean "all oyster beds or bars under any of the waters of this State whereon the natural growth of oysters is of such abundance that the public have successfully resorted to such beds or bars for a livelihood, whether continuously or at intervals, during any oyster season within five years prior to" the new inquiry under the terms of the statute. The annual report of the Shellfish Commissioners submitted in 1912 shows that they adopted, for the purposes of their survey and location of natural oyster bars under the Act of 1906, a definition having practically the same meaning and effect as the one later approved by the Legislature. If, however, it be assumed that the Act of 1914 prescribed an entirely different rule for determining what areas were to be devoted to the use of the public, we are unable to find in that fact any support for the appellant's claim that his contractual rights under his lease are being impaired. It would have been competent for the State to provide for the appropriation for public use of all the leased oyster grounds, regardless of the question as to whether they were natural beds or barren bottoms. If this course had been pursued in the exercise of the right of eminent domain, and with due provision for just compensation, the lessees could not complain that the constitutional prohibition against legislative impairment of contracts was violated.

The policy of the existing law with respect to the use and

disposition of oyster grounds is a question with which this Court has no right to be concerned. The sole authority to deal with that subject is vested in the Legislature. It is within the discretion of that department of the State government to decide whether the whole or any part of either the natural bars or the barren bottoms shall be open to free or to qualified public use, or shall be reserved and controlled for conservation, cultural or revenue purposes. In the exercise of its ample power the Legislature has determined that oyster areas having certain characteristics shall be devoted to the use of the public. It has provided for a judicial ascertainment of the facts in reference to any location to which leasehold rights have attached, and, in a proper case, for the acquisition of such interests for the public by condemnation. The lessee is summoned and heard upon the preliminary question as to the character of the leased ground, and, by express enactment, he is protected in his title and possession until the State shall have paid him the just compensation which may be awarded him by due process of law. In view of the safeguards thus placed by the statute around the rights and interests of the appellant, there is clearly no impairment of contract to which the constitutional provision relied upon can be applied.

The contention that the Act of 1914 is in conflict with Section 40 of Article 3 of the Maryland Constitution, prohibiting the taking of private property for public use without just compensation, requires no extended discussion. The provision of the statute against any divestiture of the property rights to be condemned until the compensation awarded is paid has already been emphasized. As the Act, by its own terms, gives expression and effect to the constitutional rule to which the appellant refers, there is no room for the theory that the limitation it imposes has in this instance been disregarded.

It was urged that the Act does not state for what public use the natural bars under lease are to be condemned, and that the Court is consequently not in a position to decide

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whether the intended use is in fact of a public nature. The further point is made that if the lots so acquired by the State are designed to be used for the purposes of a public oyster fishery under existing law, regard must then be had to the statutory provision that the right to take oysters for sale from grounds within the limits of any county shall be confined to its own residents, and it is said that this is not to be considered a public use within the intent of the Constitution. As to the question thus proposed we can have no doubt or difficulty. The plain purpose of the Act is to secure all natural beds or bars for the public use, to which oyster areas owned by the State may be subjected, under laws now in force or hereafter enacted. There can be no doubt as to the public nature of the use to which such grounds are susceptible. The taking of oysters by the public, under license of the State, from lands and waters subject to its ownership and control, is undeniably a public use. *Smith v. Maryland*, 59 U. S. 71; *State v. Applegarth*, 81 Md. 293; *Hess v. Muir*, 65 Md. 599. In order to answer that description it is not necessary that the use, as to every natural oyster bar, shall be open to the public generally, but the right may be validly restricted to the citizens of the county within whose territory the fishery is located. The principle was stated and applied in *Webster v. Pole Line Co.*, 112 Md. 429, that a public use need not be available to the whole public, and that it may be confined to the inhabitants of a designated locality, provided it is exercisable in common and is not limited to particular individuals.

The remaining question to be considered relates to the defense of former adjudication. In our opinion the principle upon which such a defense must depend is not applicable to the case presented. This is a statutory proceeding to determine the desirability of property for public use, according to a prescribed standard, as a preliminary to its acquisition for the public by condemnation. An adjudication as to the leaseable character of certain oyster grounds under the Act of 1906 could not justify a denial by the Court of the State's

power to condemn such property for public purposes under a later enactment. The legislative judgment as to the expediency of such an appropriation cannot be thus controlled by judicial action. The Courts have undoubtedly authority to decide whether the use for which private property is proposed to be taken under the power of eminent domain is public in its nature, but when this inquiry is answered in the affirmative, the question as to the propriety of exercising the power is committed exclusively to the discretion of the Legislature. *Shoemaker v. United States*, 147 U. S. 282; *Arnsperger v. Crawford*, 101 Md. 252; *New Cent. Coal Co. v. George's Creek C. & I. Co.*, 37 Md. 560; 15 Cyc. 629. By the judgment of the Circuit Court for Somerset County rendered in 1908 it was simply declared that the ground under consideration was barren bottom, and the only effect of the decree of this Court in the equity proceeding to invalidate that finding was to dismiss the bill of complaint on the theory that the charge of fraud had not been sustained. *Cox v. Bennett*, 123 Md. 361. It would be giving the doctrine of *res adjudicata* a very anomalous application to hold that it can prevent the exercise by a judicial tribunal of a special statutory jurisdiction to re-open an inquiry previously made, under authority similarly conferred, although ample security is afforded to every vested interest. It has already been observed that the Legislature could have directed the condemnation of the leased oyster lots for public use without a prior inquiry by a Court proceeding as to the special character of the ground, and notwithstanding a previous adjudication that they were leaseable. There is hence no possible prejudice to the lessee in the fact that a preliminary investigation, in which he has an opportunity to be heard, has been provided for the ascertainment of the actual condition of the property to be acquired. The theory of estoppel by former judgment was, therefore, properly rejected.

The various questions raised by the record have now been considered, and we agree with the Court below as to all of the rulings.

Judgment affirmed, with costs.

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Syllabus.

THOMAS J. McDONALD

vs.

CHAS. T. KING, ET AL.

The Speedy Judgment Act of Baltimore City: Chapter 184 of the Acts of 1886; a special and statutory proceeding; strict compliance; account filed; liability of defendant to plaintiff.

The Speedy Judgment Act, for Baltimore City, Chapter 184 of the Acts of 1886, was to obtain from both plaintiff and defendant a definite and sworn statement of both the claim and the defense (if any), so that the parties may know exactly wherein they differed and shape their action accordingly. p. 593

The proceeding under the statute is special and statutory, and it is only when the provisions of the Act are strictly complied with that the court has authority under it to enter judgment by default. p. 593

To obtain the benefit of the statute, the account which must be filed with the declaration must be one which either on its face shows the liability of the defendant and the amount of such liability, or one which itself furnishes the standard or means of arriving at such liability. p. 594

Unless the account filed with the declaration conforms to these requirements, the court has no jurisdiction to enter a judgment by default. p. 594

A contractor having failed to install the kind of heating plant such as he had agreed to install, the plaintiff notified him

that unless he made the necessary changes, to make it conform to the contract, that he, the plaintiff, would have the changes made at the cost of the contractor; the contractor failing or refusing, the plaintiff employed a mechanic to do the work; the plaintiff brought suit against the first contractor, under the Speedy Judgment Act; the account filed with the declaration was the bill of the mechanic against the plaintiff, and the liability of the defendant nowhere appeared thereon: *Held*, that such an account was not such a one as to bring the suit under the provisions of the Act. p. 594

Decided February 24th, 1915.

Appeal from the Court of Common Pleas of Baltimore City. (DAWKINS, J.)

The facts are stated in the opinion of the Court.

The cause was submitted on briefs to BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Israel B. Brodie and *Julius H. Wyman*, submitted a brief for the appellant.

George A. Solter, submitted a brief for the appellee.

BURKE, J., delivered the opinion of the Court.

This suit was brought in the Baltimore City Court under the Speedy Judgment Act. The case was removed to the Court of Common Pleas, where it was tried. The jury rendered a verdict for the defendants, and from the judgment entered upon the verdict the plaintiff has brought this appeal. There are no exceptions to testimony, or to the rulings upon prayers. The appeal presents for review the action of the Court in striking out a judgment in favor of the plaintiff for \$125.45 and costs entered on the first day of October, 1912. The declaration contained the common counts, and

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one special count. The special count alleged that the plaintiff and defendants entered into an agreement on or about the 9th day of September, 1909, whereby the defendants contracted and agreed with the plaintiff to install in a workmanlike manner, a steam heating plant in a part of the building and premises situated at the northeast corner of Hillen and Front streets in the City of Baltimore at and for the sum of two hundred dollars; that the defendants did not install a steam heating plant in said premises, but instead of so doing the defendants installed, without the knowledge or consent of the plaintiff, a plant which was in part a steam heating plant and in part a hot water heating plant, that is to say, the defendants installed the pipes and radiators suitable for a steam heating plant, and a boiler or heater for a hot water heating system; that the plaintiff, believing that a steam heating plant had been installed, as agreed to be done by the defendants, paid the defendants the sum of two hundred dollars; that for a period of about one year the plaintiff remained in the belief that the plant was a steam heating plant, but immediately upon ascertaining that it was not a steam heating plant, but was in part a steam heating plant and in part a hot water heating system, he notified the defendants to make the plant conform to such a plant as had been agreed upon between him and the defendants, which the defendants failed to do; that the plaintiff then notified the defendants that unless they should proceed to carry out their contract with the plaintiff, he would have the work done at the cost and expense of the defendants; that the defendants failed to perform the contract, and the plaintiff then had the plant changed and altered in such a manner and to such an extent as to make it conform to such a plant as the defendants had agreed to furnish to the plaintiff; that the plaintiff notified the defendants that he had said work done, and that he had paid the costs thereof to the person who did the same, and demanded payment of the cost thereof by the defendants to him; that the defendants failed and refused to pay the same.

The account filed with the *narr.* was as follows:

“Mess. Charles T. King, George F. Lang and John G. Beck, co-partners, trading as Charles T. King & Company.

To Thomas J. McDonald, Dr.,

To these amounts paid to Joseph C. Mitchell:

Mar. 22nd.—For time of plumber and helper taking down old boiler and removing bursted section.....	\$ 5.00
Mar. 27th.—One No. 5-15-7 Steam Boiler....	96.00
Mar. 27th.—2-2 in. sockets, 24 cts., 1-1 in. union, 30 cts., 2-1 in. nipples, 20 cts.74
Mar. 27th.—1-1 in. Ell., 12 cts., 4 3x2 bushings, \$1, 2-1 in. bushings, 40 cts..	1.52
Time Henry and John (16 hrs.) 2 days ea. at \$7.50 per day.....	15.00
To Wallace & Gails bill for covering boiler with asbestos.....	4.82

\$123.13

On June 26, 1912, a judgment by default was entered for want of a plea and affidavit. Following the entry of this judgment certain motions and orders were filed which need not be considered, as they do not affect the question to be decided. On October 2, 1912—the day following the entry of the final judgment—the defendants filed a motion, under oath, to strike out the judgment and assigned in support thereof a number of reasons. The third reason is hereby transcribed: “Because the voucher or writing filed with the declaration is not sufficiently definite, and does not show on its face a *prima facie* case of indebtedness from the defendants to the plaintiff.” On the tenth day of December, 1912, the Court struck out the judgment, and on the same day the defendants filed the general issue pleas upon which issue was joined.

If the appellant failed to bring his case within the requirements of Chapter 184 of the Acts of 1886, the Court had no

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jurisdiction to enter either the judgment by default or the final judgment of October 1, 1912. In *Thillman v. Shadrick*, 69 Md. 528, a judgment by default was entered and extended the same day. Two days later a motion was made to strike out the judgment on the ground of the insufficiency of the account filed with the *narr*. After quoting from the provisions of section 171 of the Act, the Court said: "The object of the Act was in cases to which it applied, to obtain from both plaintiff and defendant a definite and sworn statement of both the claim and the defense (if any), so that the parties might know exactly wherein they differed and shape their action accordingly." *Adler v. Crook*, 68 Md. 494.

Now, there was no bond, bill or written contract filed, and unless the cause of action which we have set forth be an account or a statement of the particulars of the defendant's indebtedness, the appellee was not entitled to a judgment by default. If he was not entitled to such a judgment by reason of having failed to bring his case within the provisions of the statute, the Court was clearly without jurisdiction to enter it. And if the Court had no jurisdiction, the irregular entry of the judgment by default could not aid or supply that want of jurisdiction. The proceeding is a special, statutory one, and it is only when the provisions of the Act are strictly complied with that the Court has authority to enter a judgment by default under it. *DeAtley v. Senior*, 55 Md. 482. This circumstance distinguishes this case from those relied on by the appellee, where judgments by default, regularly entered in the exercise of the Court's general powers, were held to settle conclusively the question of jurisdiction without regard to any of the subsequent proceedings."

In *Poe on Practice*, sections 413 and 415, it is stated: "In addition to the affidavit which the plaintiff is required to make, he must file with his affidavit the bond, bill of exchange, promissory note or other writing or account by which the defendant is indebted to him, as set out in his affidavit. The voucher or vouchers of the plaintiff's claim are indispensably necessary to be filed, and they must on their face show a

prima facie case of indebtedness from the defendant to the plaintiff for a certain amount or an amount which they furnish the means of making certain." (Section 415): "As the result of the authorities, it may be stated that the claim, in order to be within the Act, must be one for an ascertained amount of liquidated indebtedness, to which a plaintiff can safely and properly swear; and the cause of action which must be filed with the declaration must be one which either on its face shows the liability of the defendant and the amount of such liability, or which itself furnishes the standard or means of arriving at such liability." See also *Commonwealth Bank v. Kirkland*, 102 Md. 662; *Mueller v. Michaels*, 101 Md. 191; *Mutual Life Ins. Co. v. Murray*, 111 Md. 609.

Tested by these rules, is the account filed in this case sufficient under the Act?

We think it falls far short of gratifying the requirements of the statute. It shows no indebtedness from the defendants to the plaintiff. It appears from the account that certain sums of money were paid by the plaintiff to Joseph C. Mitchell for certain specified articles mentioned in the account, and for which it is sought to charge the defendants. *Prima facie* the debt for which the suit was instituted is a debt due by Mitchell to the plaintiff and nothing whatever appears from the account as to why or how the defendants can be held liable for any of the items charged. As the account did not conform to the requirement of the statute, the plaintiff was not entitled to either judgment, and the Court was without jurisdiction to enter either, and that it properly struck out the judgment.

In view of the conclusion we have reached as to the insufficiency of the account, the other reasons assigned for vacating the judgment need not be discussed.

Judgment affirmed, with costs to the appellees above and below.

Md.]

Syllabus.

WM. FORSE SCOTT, ASSIGNEE IN BANKRUPTCY OF JAMES
WATSON WEBB, AND OF TILLY ALLEN, AND THE BAL-
TIMORE TRUST COMPANY, ADMINISTRATOR C. T.
A. OF TILLY ALLEN,

vs.

JOHN S. GITTINGS, RECEIVER OF THE GEORGE'S CREEK
COAL & IRON COMPANY.

STATE OF MARYLAND

vs.

JOHN S. GITTINGS, RECEIVER, AND WM. FORSE
SCOTT, ASSIGNEE OF JAMES WATSON WEBB, AND AS-
SIGNEE OF TILLY ALLEN, AND THE BALTIMORE
TRUST CO., ADMINISTRATOR, C. T. A. OF TILLY ALLEN.

CITY OF BALTIMORE vs. SAME.

*Stock certificates: in name of "agent" or "trustee"; burden of
proof; unclaimed stocks and dividends; property of stock-
holders. Section 135 of Article 93 of Code. State's
right to personalty of intestate, with no kin
within fifth degree. Appeals: parties
with no interest in suit.*

Where a certificate of stock is issued to an individual as
"agent," and it so appears on the stub in the corporation stock
book, it indicates that the stock is not his property personally,
and his personal representative is not entitled to have the stock
transferred to him. p. 599

Where a stock is issued in the name of an individual as "trust-
tee," upon the death of the stockholder, the burden of proof is
upon anyone claiming through or for him, to prove what, if
any, is his legal or equitable interest in the stock. p. 599

Section 135 of Article 93 of the Code, and the provisions of
the Charter of Baltimore City, entitling the State of Maryland

or City of Baltimore to the personal property of an individual who dies without leaving surviving any widow, husband, or relations within the fifth degree, etc., applies only to cases of intestates. p. 604

These provisions do not apply to cases of stock in the name of an individual as "agent" or "trustee," when there is no evidence as to whether the interest of the principal, or the interest of the *cestui que trust*, has terminated or lapsed. p. 604

Where a party to a suit has no interest in the subject-matter of it, he has no standing to appeal from an order disposing of the property, and such appeal, if taken, will be dismissed. pp. 604, 609

There is no presumption in law that a party died without leaving issue. p. 604

Where a corporation declares a dividend, limitations begins to run against the claim of the stockholder only from the time that demand for the dividend is made. p. 606

Upon the dissolution of a corporation its unclaimed stock or dividends revert to, or become the property of, the general creditors, or the general stockholders. p. 608

The provisions in section 135 of Article 93 of the Code, for the reversion to the State of the funds or personal estate of parties dying intestate, without any relations within the degrees of kindred named therein, to be distributed to the Board of County School Commissioners of the county where letters of administration on the estate were granted, can have no application to the case of stock standing in the name of a trustee, domiciled in a foreign State, and where there was no evidence as to who were the *cestui que trustent*, nor in what county the letters should be granted. p. 602

Decided April 8th, 1915.

Three appeals in one record from the Circuit Court of Baltimore City. (DAWKINS, J.)

The causes were argued before BOYD, C. J., BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

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Opinion of the Court.

Leigh Bonsal (with *Joseph C. France* on the brief), for William Force Scott, assignee of Allen.

Joseph C. France and *Leigh Bonsal*, for Wm. Force Scott, assignee of James Watson Webb.

Stuart S. Janney, for the Baltimore Trust Company.

Richard S. Culbreth (with whom were *Bernard Carter & Sons* on the brief), for certain stockholders of the George's Creek Coal Company.

Charles McHenry Howard (with whom were *Bernard Carter & Sons* on the brief), for the Receivers and certain stockholders.

Edgar Allan Poe, the Attorney-General, and *Carville D. Benson* (with whom was *John Dix Nock* on the brief), for the State of Maryland.

S. S. Field, the City Solicitor, for the City of Baltimore.

STOCKBRIDGE, J., delivered the opinion of the Court.

The record in this case contains three appeals from an order of the Circuit Court for Baltimore City by which certain exceptions which had been filed to an auditor's account were overruled, and that account finally ratified and confirmed. One of these appeals was taken on behalf of the State of Maryland, another on behalf of the Mayor and City Council of Baltimore, and the third by William Force Scott, general assignee in bankruptcy, acting especially for James Watson Webb and for Tilley Allen, and Charles B. Peabody and Henry C. Little, substituted trustees under a deed of

trust from George Peabody. The last exceptions, in their amended form, are conditional and are only to be considered in the event of the contention in the first two appeals being sustained.

Motions have been made to dismiss the appeals of the State of Maryland, and of the Mayor and City Council of Baltimore and in our opinion these motions should be granted. The question involved in these two appeals are the same, but in view of the large amount of litigation to which the fund in this controversy has given rise, it seems proper to review, as concisely as may be, the facts out of which the litigation has arisen, and then consider the questions of law presented by the claim made on behalf of the City and State.

In 1838 there was issued by the George's Creek Coal and Iron Company a certificate for 100 shares of its stock in the name of "Morris Robinson, Agent," and in 1841 there was issued a certificate for 41 shares of the same stock in the name of "Talley Allen, in Trust." There was no entry whatever upon the books of the George's Creek Company to indicate for whom Morris Robinson was agent, or for whom Talley Allen was trustee, or the nature of the trust. Neither at the time of the issue of these certificates, nor for a long period thereafter, was the stock a paying one. No dividend of any description was declared or paid to the stockholders until the year 1864, and from that time on dividends were regularly declared and paid to the stockholders, once or twice in stock, but generally in cash. No one, however, appeared to claim any of the dividends declared upon the stock so standing in the names of "Robinson, Agent," or "Allen, in Trust." The certificates of the stock dividends and the cash of the cash dividends remained in the hands of the George's Creek Company up to the time of the dissolution of that company, and in the course of the forty-odd years which elapsed from the time when the declaration of dividends was begun, the aggregate of those dividends amounted to the very considerable sum for the two holdings of, approximately, \$90,000.

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Opinion of the Court.

In 1910 Malcolm V. Tyson filed a bill in the Circuit Court No. 2 of Baltimore City, as administrator of Robinson, deceased, the purpose of which was to have delivered and paid over to him the stock, and accumulated dividends upon the stock standing in the name of "Morris Robinson, Agent." The decision in that case is reported in 115 Md. 564, where this Court held that as Tyson was suing in the representative capacity of an administrator, he could recover only such property as had belonged to Robinson individually, and that the addition of the word "agent," as it appeared on the stub of the certificate, indicated that the stock and dividends for which his bill was filed, was not the property of Robinson personally, and, therefore, that his personal representative was not entitled to have delivered to him any stock or other property which Robinson may have held in a fiduciary capacity, such as an agent.

The next step in the litigation was the case of the *Baltimore Trust Co. v. The George's Creek Coal and Iron Co.*, 119 Md. 21. That suit was brought by the Baltimore Trust Company as receiver, for the Tilley Allen stock, and in that case the pleadings alleged the *belief* of the plaintiff that no trust ever existed in respect to said stock, but that the same belonged to him individually. The receiver had been appointed without notice to the George's Creek Company, and in that case it was held, first, that the pleadings did not disclose any sufficient reason for the appointment of a receiver without notice to the George's Creek Company; and, second, that the plaintiff had not shown any such legal or equitable interest in the subject-matter of the petition as to warrant it in asking for the appointment of a receiver.

The third suit was a bill filed by certain stockholders of the George's Creek Company asking that the Circuit Court of Baltimore City assume jurisdiction over the dissolution of that company, steps looking to that end having been previously taken by the corporation without judicial proceedings, and asking, further, that receivers might be appointed to take charge of and distribute the assets of the corporation.

and wind up its affairs. In that bill it was alleged that it was *probable* that the stock standing in the name of "Robinson, Agent," was held by him as an agent of the corporation. and it asked that the value of that stock and the dividends accumulated thereon should be divided among the remaining stockholders in proportion to their respective holdings; and with regard to the Allen stock it was alleged, that if the proceedings instituted by the Baltimore Trust Co. were successful, the George's Creek Co. would be divested of the possession of said accumulated fund, although the lawful ownership of the same might remain unestablished, to the injury of the plaintiffs and other stockholders in the George's Creek Co. In this case a decree was entered on the 26th of January, 1914, dissolving the George's Creek Company, and appointing John S. Gittings, the present appellee, receiver.

A further attempt to secure the stock and accumulated dividends in the "Robinson, Agent," branch of this case was made in a bill filed in Circuit Court No. 2 of Baltimore City, by Charles B. Peabody, et al., Trustees, against the George's Creek Coal and Iron Co., reported in 120 Md. 659. This case was brought upon the theory that the stock in question was the property of James Watson Webb, that said Webb was indebted to the Bank of the United States in the sum of \$3,090 upon his note dated May 23, 1839, and that the stock which stood in the name of "Robinson, Agent," had been delivered as collateral security for this note at the time of its negotiation with the Bank of the United States, and that it passed to the trustees of that bank under the deed of June 7th, 1841, was uncollected by them and passed by their deed of May 21st, 1855, to Samuel Jaudon and others, the stock being a part of the unadministered assets of the bank. That subsequently on December 31, 1866, all of the then unadministered assets of the Bank of the United States were disposed of by Jaudon and others, trustees, to George Peabody, and that on September 28th, 1869, George Peabody transferred to George Peabody Russell and others, as trustees, all of the remaining assets of the United States Bank

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then held by him. In the auditor's account filed in 1855 was contained a list of assets then in the hands of Jaudon and others, as trustees. In that list of assets appears the entry, "J. Watson Webb, \$3,090," but without mention of the collateral, and to the petition for the order under which Jaudon and others made their sale to Peabody, was appended a schedule which was said to contain a "full statement of all of the said assets yet remaining in the hands of your petitioners," but in this schedule neither the note of James Watson Webb, or of any collateral deposited with it, appeared.

In the case of *Peabody against the George's Creek Co.*, 120 Md. 659, this Court held that the evidence adduced, failed to show sufficiently that the 100 shares of George's Creek stock had passed to George Peabody in December, 1866, and, therefore, the plaintiffs in that action failed to recover the stock and dividends which had been declared on it.

The case of *Scott against the George's Creek Co.* was instituted in the United States District Court for Maryland; see 202 Fed. 251, and the purpose of that suit was to recover the Tilley Allen stock, upon the theory that Allen had been adjudicated a bankrupt by the United States District Court of the Southern District of New York in 1842, and that Scott as official or general assignee in bankruptcy was entitled to any of the property of the bankrupt not theretofore reduced to possession by a bankrupt assignee; it further raised the question of the *bona fides* of the trust, claiming substantially that there was no trust in fact, but that such designation was for the purpose of concealing the property from Allen's creditors, and that it in reality belonged to Allen individually. Mr. Scott, likewise in his capacity of official and general assignee in bankruptcy, claimed an interest in the "Morris Robinson, Agent," stock, upon the theory that such stock had been the property of James Watson Webb, that Webb was also a bankrupt, and that Scott as official assignee in bankruptcy was entitled to the Webb stock, or at least so much of that stock and its accumulations as might remain after

the satisfaction by payment to the Peabody trustees of the note of Webb for \$3,090, and interest thereon. In the United States District Court the proceeding was not dismissed, but was held in abeyance to await the determination of the pending case instituted by Montell and others, the Federal Court holding that there existed a concurrent jurisdiction in the State and Federal Courts, that the proceeding was in the nature of a proceeding *in rem*, with the fund as the *res*, that the jurisdiction of the State Court having first attached, the proceedings in the Federal Court would be stayed to afford an opportunity for action by the Courts of this State.

The case of *Montell and others against the George's Creek Co.* was then proceeded with, and culminated, under an order of the Circuit Court of Baltimore City, in an auditor's account by which the funds belonging to the stockholdings of "Robinson, Agent," and "Allen, in Trust" (and which was then in the hands of Gittings, the receiver appointed by that Court) was finally distributed and disposed of. This account was filed on July 17th, 1914, and on July 25th, 1914, the State of Maryland intervened by petition and exceptions to the account. In the petition it avers that the State was entitled to the entire amount of both funds under section 135 of Article 93 of the Code, avering that the true owners of the stock long since died, and that no widow, surviving husband or relations within the fifth degree counting down from the common ancestor has come forward to claim any part of the said funds. On October 17th, 1914, the City of Baltimore intervened by exceptions and petition, alleging that it was entitled to both funds, under the same section of the Code as that upon which the State based its claim, and further under the provisions of the City Charter, sections 808-812. The exceptions of the State and City being overruled, the present appeals were taken.

The claims asserted to these funds by the State and by the City of Baltimore can appropriately be considered together, since they are both based upon the same provisions of the Code, the effect of which is, that if those claims are valid, the

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title to the property now in dispute vests in the State, and the property belongs to the State, to be "paid to the Board of School Commissioners of the county wherein letters of administration shall be granted upon the estate of the deceased for the use of the public schools of said county;" and in the case of the City of Baltimore, the title being vested in the State, is to be paid to the Board of School Commissioners of said city.

The initial difficulty with the claim now presented on behalf of the State and City of Baltimore lies in the fact that neither Morris Robinson or Tilley Allen were residents of this State at the time of their death, but both were domiciled in New York, and in the existing lack of proof as to who was the principal of Robinson, or who was or were the *cestui que trustent* of Allen, it is impossible to say to the school commissioners of what county or the City of Baltimore the money should be paid, and the statute makes no other disposition of such a fund.

A further difficulty is presented by the fact that Tilley Allen, if he had any right to or interest in the stock personally, left a will, while the statute relates to cases of intestacy only. With regard to Robinson, administration was granted on his estate in 1909 by the Orphans' Court of Baltimore City, and the section of the Code directs the payment of moneys, where the intestate left "no widow or relations of the intestate within the fifth degree" to the Board of School Commissioners of the county wherein letters of administration shall be granted. But this section becomes operative only upon the assumption that the stock in question was the individual property of Robinson, and in *Tyson, Adm., v. George's Creek C. & I. Co.*, 115 Md. 564, this Court held that the property in the stock was not his, individually. But even if these difficulties could be overcome there are other and serious obstacles to the establishment of the right of the State and City to the funds.

The motion to dismiss involves a consideration of the nature and extent of the interest of the State and the city

in the subject matter with which the present litigation has to deal, for it has been settled by a long line of adjudications in this State, that where a party to a suit has no interest in the subject matter of it, he has no standing in the Court with respect to the disposition of the property involved in the particular case. *Wagner v. Freeny*, 123 Md. 24, and cases there cited. The claim of the city and State, if valid at all, must derive that validity under the provisions of the Code, sec. 135 of Art. 93, which provides for the devolution of the property of an intestate, and the vesting of the title to it in the State in the event of his dying, leaving no widow or relations within the fifth degree, counting down from the common ancestor. No right can arise upon the theory that the property belonged to Morris Robinson or Tilly Allen individually, and that they died intestate without leaving relatives within the required relationship. That necessarily follows from the decisions of this Court in the case of *Tyson v. George's Creek Co.*, 115 Md. 564, in which it was distinctly held that these funds had not been shown to belong to the persons named, in an individual capacity, but were held by them respectively in a representative or fiduciary capacity. Who was or were the principal and the *cestui que trustent* in the two cases has not thus far been established by the evidence; nor has the evidence sustained the allegation that the Allen stock was issued to "Allen, in trust" for the purpose of defrauding his creditors. Therefore, the parties in interest were the principals of Robinson, and the *cestui que trustent* of Allen. There being no direct evidence as to who the principal or *cestui que trustent* were, there is of course no evidence as to whether they died intestate or testate, and while from the long lapse of time their death may be presumed, there is no presumption in law that a party has died without issue, *Sprigg v. Moale*, 28 Md. 497, 506; *Chew v. Tome*, 93 Md. 244, 252. And since the dying without issue is a matter for proof in a case like the present, no right can arise based upon an alleged death, without issue, unsupported by proof of the allegation.

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In this connection reliance is placed by the State and city upon the case of *Guyer v. Smith*, 22 Md. 239. That was a suit in ejectment, instituted at a time when under the law of this State, an alien was not permitted to hold real estate, and the law as laid down in that case was to the effect, that since an alien holding of real estate was in contravention of the statute, where title passed to one who was an alien he held it "not for his own benefit but for the benefit of the State and subject to be divested by the State upon an inquest of office found." There is of course a radical difference between property attempted to be held by one who is without the legal capacity to hold, and property belonging to those who are not laboring under such incapacity, though up to the present time they may have made no claim therefor. In the case of *Guyer v. Smith*, *supra*, it is further said that "the escheat of lands without office found, prevailed during the latter part of the period of the proprietary government in this State, and the practice of an inquisition of office found, having fallen into disuse was not afterwards resumed," therefore, it is no longer an essential that there should be an inquisition in this form. The distinction between *Guyer v. Smith* and the present case is so marked that that decision cannot be regarded as any authority to sustain the position of the city and State in the present litigation.

The case of *Matthews v. Ward*, 10 G. & J. 443, was decided by JUDGE ARCHER in 1839, and in that case the property was held to have escheated to the State, because its former owner had died *without heirs or kin*, and for the reason, as stated in *Casey v. Inloes*, 1 Gill, 506, that the State was *ultimus haeres* and takes the property for the benefit of all. These cases differed, however, from the one under consideration, in that it was apparently established that the former owner of the property had died "*without heirs or kin*," a condition which is not presented by the record in this case. In this connection it is to be observed that there has been no proceeding instituted by either State or city looking to the forfeiture to the State of the property in this case, al-

though such is apparently the ordinary mode of procedure. *American Loan & Trust Co. v. Grand Rivers Co.*, 159 Fed. 775; *Hamilton v. Brown*, 161 U. S. 256; *Am. Land Co. v. Zeiss*, 219 U. S. 62.

But if it be assumed that the intervention of the State and city in the present case be regarded as a sufficient judicial proceeding, under the decisions of the Supreme Court of the United States referred to, the question still remains, whether the State by an application of the doctrine *parens patriae* can lay a valid claim to the fund now in question, and in the consideration of this it will be well also to consider what the effect was of the decree by which the corporation was dissolved. In the able briefs filed by the city and State, special reliance was placed upon the cases of the *Severn & Wye Railway Co.*, 1 L. R. Ch. Div. (1896) 559; *Coulter v. Robertson*, 24 Miss. 278 and *Fox v. Horah*, 36 N. C. 358. The first of these cases deals primarily with the question whether or not, where a corporation declares a dividend, it becomes a trustee for the stockholders as to such dividend, and holds that it does not, and that limitations will run as against the stockholder from the declaration of the dividend. The rule adopted in that case, certainly so far as the question of limitations is concerned, is not that which has been followed in this country. Here the rule is that there must be a demand by the stockholder for the dividend, and that limitations will run only from the time of the demand made. In dealing with the dissolution of a corporation it is held that at the common law upon the dissolution, its real estate reverts to the original owners or their heirs, and that its personal property vests in the state or sovereign, and all debts due to it and from it were extinguished by operation of law. This rule of the common law was adopted in Indiana in the case of the *State Bank v. The State*, 1 Blackf. 267; 12 Am. Dec. 234; but that case was subsequently overruled by the case of the *State v. Bailey*, 16 Ind. 46, upon the authority of *Bacon v. Robertson*, 18 How. 480. In the case of *Coulter v. Robertson*, *supra*, the same common law doctrine was recognized

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and applied in the State of Mississippi; but in the case of *Bank of Miss. v. Duncan*, 56 Miss. 173, CAMPBELL, Justice, in delivering the opinion of the Supreme Court of that State, said: "The injustice of the common law rule and its hostility to the more enlightened spirit of the age were urged upon the High Court of Errors and Appeals by counsel, who insisted that it was condemned by reason and the principles of modern and enlightened jurisprudence; but the firm answer of the Court was, that, except as modified by statute, the common law on this subject was in full force and operation in this State. We have no hesitation to declare our full concurrence with the views of counsel on this point and our dissent from the view of the High Court of Errors and Appeals announced in the case of *Coulter v. Robertson*."

The Supreme Court of North Carolina held in *Fox v. Horrah*, *supra*, that the English common law doctrine before stated, was in force in that State, and that decision was approved in *Malloy v. Mallett*, 6 Jones Eq. 345. But the force of these decisions as an authority for the doctrine, was completely nullified in the case of *Von Glahn v. DeRosset*, 81 N. C. 467, which while it did not in terms overrule the prior decisions, held that those cases had been decided by the application of strict legal principles, but that the harshness of the doctrine would be entirely overcome by the application of equitable principles, which were applied in the case then before the Court.

The Supreme Court of the United States has never recognized the existence in this country of any such rule of law as that claimed to have been the rule of the English common law in reference to the property of a dissolved corporation; on the contrary that tribunal uniformly held that the property of such a corporation constituted a trust fund for the payment of its creditors and for distribution among the stockholders. *Greenwood v. Freight Co.*, 105 U. S. 13, in which case there had been a repeal of the Charter of the company, the Court said: "The rights of shareholders of such a corporation to their interests in the property are not

annihilated by such repeal and there must remain in the courts the power to protect these rights." To the same effect are many other decisions: *Curran v. Arkansas*, 15 How. 304; *Terrett v. Taylor*, 9 Cranch. 43, 52; *Mumma v. Potomac Co.*, 8 Pet. 281; *Curry v. Woodward*, 53 Ala. 371; *Howe v. Robinson*, 20 Fla. 352; *Robinson v. Lane*, 19 Ga. 337; *Mining Co. v. Mining Co.*, 116 Ill. 170; *Nat. Trust Co. v. Miller*, 33 N. J. Eq. 155; *Heath v. Barmore*, 50 N. Y. 302; *Moore v. Schoppert*, 22 W. Va. 282.

In *Lauman v. Lebanon Valley R. R. Co.*, 30 Pa. St. 42, it is said: "The dissolution works a change in the form of the interests of its members, by destroying the stock and substituting the thing which the stock represented, that is, a legal interest in the property, and leaves the members to such a division of this." This property no law can take from its owners and transfer to another without compensation, nor appropriate to the use of the State without due process of law. This entire subject is fully and carefully considered in the case of the *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684, and full note thereto appended.

The case of the *American Loan and Trust Co. v. Grand Rivers Co.*, 159 Fed. 775, presents many points of similarity to the case under consideration. There certain property had been sold under a foreclosure of mortgage, and a distribution ordered and made of the proceeds of the sale, among the bond holders rateably. Some of the amounts audited for distribution lay unclaimed for more than ten years, when the question arose as to the proper distribution of the funds unclaimed, and among the claims to it presented and was on behalf of the United States, as property without an owner; but it was held properly distributable among the remaining bond holders who had not been paid in full, otherwise to the general creditors, otherwise to the stockholders.

From the consideration of the authorities, it inevitably follows that no title or interest in the property of the George's Creek Coal and Iron Company could pass to the State of Maryland or the City of Baltimore, either under the statute

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or as the result of the decree dissolving the corporation. Nor can there be a claim as *parens patriae* in the absence of satisfactory evidence that the line of the last owner has become extinct within the fifth degree. The doctrine adopted in this State was clearly declared in *Rockhill College v. Jones*, 47 Md. 17, where it said: "That the State has any original prerogative right to appropriate the fund to its own use in the absence of statutory rule of distribution is a proposition that can not be maintained. In England, even in the ancient period of her jurisprudence, when power was arbitrary and the rights of the subject but ill defined, such prerogative was not claimed." The statute in this State has definitely fixed the point at which the title to property shall be held to pass to the State, and the requisites to enable the State to assert its rights not having been met, it necessarily follows that a sufficient interest of the State and City has not been shown, in the subject-matter of this litigation, to entitle it to maintain its claim.

The appeal of the City and State will accordingly be dismissed, and since the appeal of Scott, assignee in bankruptcy, was conditional upon the establishment of at least a participation by the City and State in the funds now involved, that appeal will also be dismissed.

*Appeals in Nos. 36, 37 and 38 dismissed,
the costs to be paid out of the funds in
the hands of the receiver.*

THE BALTIMORE & OHIO RAILROAD COMPANY,
A BODY CORPORATE,

vs.

KATE A. GILMOR ET AL.

Equity: pleading; injunctions; allegations in bill; mere allegation of irreparable injury. not sufficient. Appeals: Article 5, section 31 of Code; orders granting injunctions.

The mere allegation of a complainant, in a bill for an injunction, that irreparable damage or mischief will ensue, is not sufficient. p. 617

To satisfy the conscience of the Court, the facts must be stated, to show that the apprehension of injury is well founded. p. 617

The obstruction of a highway is a common nuisance, and being a wrong of a public nature, the remedy is by indictment, and not by injunction, at the suit of private individuals, unless they have suffered from it some special and particular damages, different, not merely in degree, but in kind, from that experienced by other citizens. p. 617

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The ground upon which equity interposes by injunction, to prevent the destruction of a street or highway, is the irreparable injury to the complainant. p. 618

An allegation that the complainants apprehend an injury to their business, and that they will be compelled to take a circuitous route in driving to different parts of a town, is insufficient. p. 618

Section 31 of Article 5 of the Code, relating to appeals from orders refusing to grant an injunction, has no relation to appeals from orders *granting* injunctions. p. 618

Decided April 8th, 1915.

Appeal from the Circuit Court for Howard County. In Equity. (FORSYTHE, JR., J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

James A. C. Bond and *Francis Neal Parke*, for the appellant.

John E. Dempster, for the appellees.

BURKE, J., delivered the opinion of the Court.

The appellees filed a bill of complaint in the Circuit Court for Howard County against the Baltimore and Ohio Railroad Company, in which they prayed that the defendant be enjoined from permanently closing Elkridge crossing to public travel unless an undergrade crossing be constructed in

the bed of the Washington and Baltimore turnpike road where the same passes under said railroad of sufficient height and width to accommodate small vehicles, as well as a foot passage, and for other and further relief.

The defendant filed a demurrer to the whole bill, which the Court overruled and granted the injunction as prayed. From the order granting the injunction the defendant has appealed.

The bill alleged that the plaintiffs are *bona fide* residents, taxpayers and business men of the village of Elkridge, in the First Election District of Howard County, and for a long time have been and still are engaged in professional and various business enterprises in that village on each side of the Washington and Baltimore turnpike road at and near where the Baltimore and Ohio Railroad Company crosses said road at grade; that the Washington and Baltimore turnpike road is a public highway running through the village of Elkridge, and that it is its main thoroughfare, and has been since the year 1813, when the highway was first laid out by authority of the General Assembly of Maryland; that upon each side of this road are erected and located all the business houses, stores, post-office, freight yards, physicians' offices and many of the private dwellings of Elkridge. It alleged that the Baltimore and Ohio Railroad Company was incorporated by Chapter 123 of the Acts of 1826, and that by section 16 of the act of incorporation, it was provided that wherever, in the construction of the road, it should be necessary to cross or intersect any established road or way it should be the duty of the company to so construct its road across such established road or way as not to impede the passage or transportation of persons or property along the same. It further alleged that the Washington and Baltimore turnpike road was an established road or highway more than ten years before the incorporation of the defendant company, and that by the Act of 1833, Chapter 170, the railroad company and the turnpike company were authorized to and did make an

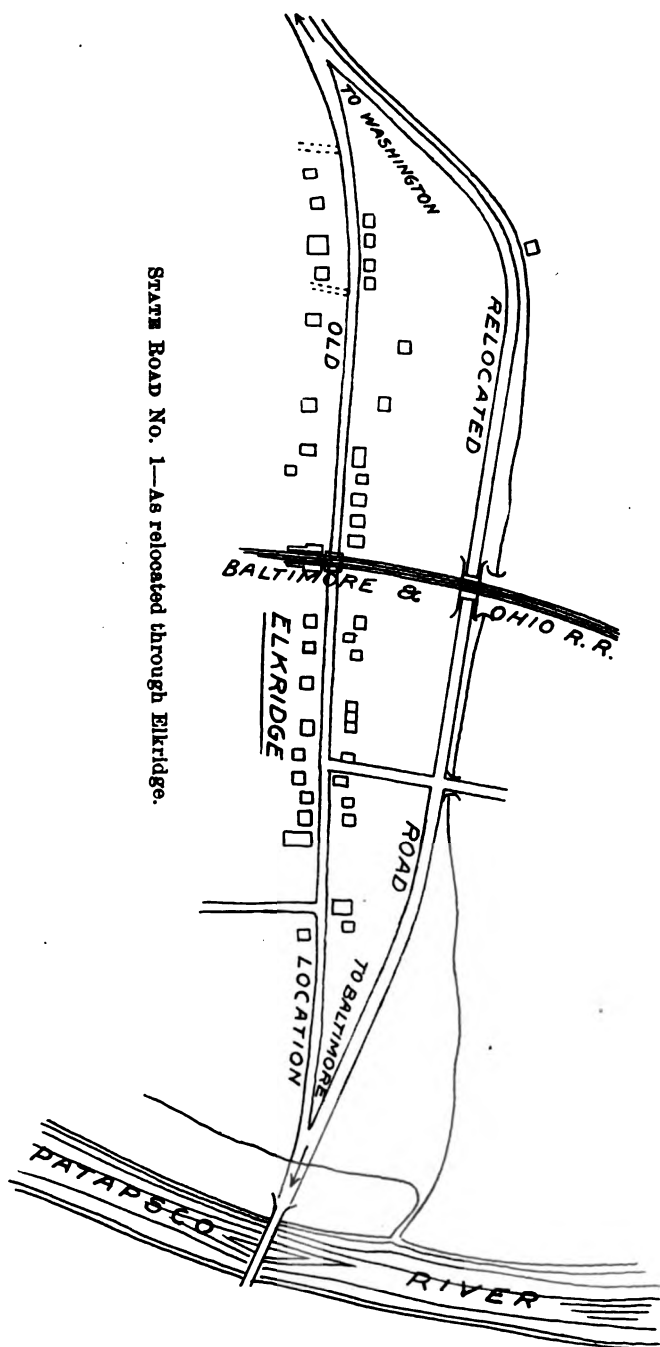
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agreement to change the grade at Elkridge crossing, which agreement bears date the 13th day of May, 1834, and that by said agreement the grade of the turnpike was altered and re-established at a five-degree grade as it approached the Elkridge crossing, and that said grade would at the present time be an easy and safe grade and would not impede the transportation and passage of persons along said highway. It is charged that after the execution of said agreement, the railroad company built its roadway crossing the turnpike road in accordance with the terms of the agreement, and that since the building of its roadway it has from time to time elevated its roadbed until within the last few years it has created a grade approaching said crossing so great that the passage and transportation of passengers and property at said crossing is now almost impossible. The bill further charged that the State Roads Commission has recently completed a new roadway running to the north of the present Washington and Baltimore turnpike road, passing under the Baltimore and Ohio railroad, and that since the completion of this new road, the railroad company has permanently closed the crossing at Elkridge where the turnpike road is crossed by the railroad, and that it is now engaged in the act of building a concrete subway under the railroad in the bed of the turnpike road for foot passage only, which, it is charged, is contrary to and without any authority of law; that the new road, just completed by the State Roads Commission, is so located as to be nothing more than a back road; that it is located immediately in the rear of all dwellings located on the north side of the Washington and Baltimore turnpike road, and can be of no use in the development of the village of Elkridge, and of no financial or business benefit to the residents thereof; that to permit the closing of the Elkridge crossing, without providing for an undergrade crossing where said grade crossing is now closed, and dividing, as it will, the village of Elkridge by an impassable barrier, necessarily works a destruction of the complainants'

businesses, decreases the value of their property and deprives them of the use and enjoyment of the highway, as they have always used and enjoyed the same; that the railroad company has already cut down the highway on the east side of its right of way where the highway crosses the railroad, and has driven piling to carry its tracks while it is building its subway, and that a change in the plans of the railroad company, providing an undergrade crossing where the railroad now crosses the turnpike would, according to present conditions, add but little additional cost to the railroad company, and could be done and carried out without injury or damage to the property. It is further alleged that the Baltimore and Ohio Railroad Company created the dangerous condition at the railroad crossing contrary to law and contrary to the Act creating it, and should be required to comply with section 16 of its act of incorporation, and make safe the highway so as not to impede the transportation and passage of persons and property along the same, and inasmuch as it is impossible for it to reduce the elevation of its roadbed as at present built and constructed, that in the place and stead of the subway now about to be built in the bed of the highway, that the railroad company be required to build an undergrade crossing sufficient to accommodate a part of the traveling public using small vehicles over said highway. It is charged that the closing of said crossing, without providing an undergrade crossing, would work irreparable damage to the plaintiffs and each of them, and that they are without any adequate remedy at law.

A diagram is here inserted which shows the location of the turnpike, the newly constructed State road, and the Elkridge crossing mentioned in the bill.



STATE ROAD No. 1.—As relocated through Elkridge.

By Chapter 312 of the Acts of 1906, it was provided "that a public highway, to be known as State Road No. 1, be and the same shall be constructed between the cities of Washington and Baltimore, the course of which, *as near as practicable*, shall be along the route of the old Baltimore and Washington road, the bed of which, so far as the same is vested in the State or the several counties through which it passes, is hereby dedicated by way of easement or fee simple, as the case may be, to the public use."

The Act of 1912, Chapter 373, provided that State Road No. 1, which was required to be built by the Act of 1906, should be built through the town of Elkridge, "upon the bed of the old Washington and Baltimore turnpike road and at the same grade as the said road is at present constructed." By Chapter 50 of the Acts of 1914 the sum of \$15,000 was appropriated to the State Roads Commission "for the purpose of concreting through the village of Elkridge the old Baltimore and Washington turnpike, from curb to curb, through said village, beginning at the point where the Baltimore and Washington boulevard diverges from said turnpike to the westerly side of said village to the point where said boulevard again connects with said turnpike on the easterly side of the said village near the Patapsco River, provided nothing herein shall prevent the closing of the grade crossing of the B. & O. Railroad upon the establishment of the State Roads Commission and said railroad of an under-grade crossing between Elkridge and the Viaduct Bridge."

This new road which diverges from and connects with the turnpike road at the points mentioned in the Act, and which is called in the bill "a back road," is shown upon the above diagram.

From the allegations of the bill and the Acts of Assembly referred to, the Court is called upon to deal with the following state of facts—*first*, that the plaintiffs are residents, taxpayers and business men of the village of Elkridge, with residences and places of business located on each side of a pub-

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lic highway running through said village, and that the State has appropriated a sum of money for the purpose of concretizing the highway from curb to curb through the village; that ingress and egress to and from their residence and places of business to the highway are not destroyed by the acts of the defendant, although access to parts of the village east and west of the former railroad crossing by wagons and vehicles is rendered more inconvenient; *secondly*, the plaintiffs are not alleged to be abutting landowners, or that they hold any title to the bed of the highway; *thirdly*, that the defendant by cutting down the east approach to the crossing and closing the same has obstructed the public highway, and that the subway which it proposes to construct in the bed of the highway, is designed to accommodate pedestrians only. The character and extent of the business in which the plaintiffs are engaged are not disclosed in the bill, and it is not alleged that they have in fact sustained damage to their business by the acts of the defendant. It is alleged that to permit the closing of the crossing, without providing an undergrade crossing, "necessarily works a destruction of their businesses, etc.," but no facts are stated to support this statement. "The mere allegation of a complainant that irremediable damage or irreparable mischief will ensue is not sufficient. To satisfy the conscience of the Court, the facts must be stated to show that the apprehension of injury is well founded." *Amelung v. Seekamp*, 9 G. & J. 468.

The complainants were not entitled to an injunction from the mere fact that the defendant had obstructed the highway. "The obstruction of a highway is a common nuisance, and, being a wrong of a public nature, the remedy is by indictment; it is not in itself a ground of civil action by an individual, unless he has suffered from it some special and particular damage, different not merely in degree, but different in kind, from that experienced in common with other citizens." *Houck v. Wachter*, 34 Md. 265; *Crook v. Pitcher*, 61 Md. 510; *Schall v. Nusbaum*, 56 Md. 512; *Bembe v. Anne Arundel Co.*, 94 Md. 327.

There being no appropriation of the plaintiffs' property, and no destruction of access to their property, the bill does not present the case of such serious or irreparable injury as entitled the plaintiffs to an injunction. The ground upon which the Court interposes by injunction to prevent the obstruction of a street or highway is stated in *White v. Flannigan*, 1 Md. 525; *Roman v. Strauss*, 10 Md. 89; *Gore v. Brubaker*, 55 Md. 86; *Zimmerman v. Cockey*, 118 Md. 491; and other cases. The act complained of must work irreparable injury to the plaintiff by the destruction of the highway. No such injury appears in this case. The most that appears is an apprehended injury to the plaintiffs' business by the acts of the defendant, and that they will be compelled to take a circuitous route in driving to different parts of the town. Without discussing the other grounds of objections to the bill, we hold, for the reasons stated, that the injunction should not have been granted.

A motion was filed by the appellees to dismiss the appeal upon the ground that the transcript of the record was not transmitted to this Court within the time prescribed by Article 5, section 33 of the Code. The order from which the appeal was taken was passed on October 5, 1914, and the order for appeal was filed on October 17, 1914. The record was made and transmitted to this Court on January 17, 1914, within the period of three months from "the time of the appeal prayed." As the appeal is from an order *granting* an injunction it is not within the provisions of section 31, Article 5. That section applies to orders *refusing* "to grant an injunction according to the prayer of the bill or petition filed in the cause," and on appeal taken as provided by that section "the transcript shall be made and transmitted to the Court of Appeals forthwith after the appeal prayed." The motion to dismiss the appeal must, therefore, be denied. It follows that the order appealed from must be reversed and the bill dismissed.

Order reversed, and bill dismissed, the appellees to pay the costs.

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Syllabus.

WALTER T. WIMBROUGH

vs.

SUSIE MAY WIMBROUGH.

Marriages: setting aside; terror, fraud or duress; jurisdiction of equity.

The authority of courts of equity to set aside marriages on the ground that they were procured by abduction, terror, fraud or duress, rests upon their general jurisdiction to set aside contracts affected by fraud, etc. pp. 621-622

But the courts exercise the power with extreme caution, and only where the allegations of the bill are sustained by clear, distinct and satisfactory evidence. p. 622

When ante-nuptial incontinence has taken place the charge of threat or menace unlawful, or fraud or duress, must be fully and satisfactorily established before a court of equity will annul the marriage. p. 622

The mere uncorroborated statements of the petitioner are not sufficient, especially when it is denied by all the defendant witnesses. pp. 628-629

The statement of a man, that, although he will marry a woman, he will never live with her, is not sufficient to render the marriage ceremony void. p. 629

Decided April 8th, 1915.

Appeal from the Circuit Court for Worcester County. In Equity. (JONES, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Geo. M. Upshur (with whom was *Franklin Upshur* on the brief), for the appellant.

Wm. F. Johnson, for the appellee.

THOMAS, J., delivered the opinion of the Court.

The bill in this case was filed in the Circuit Court for Worcester County on the 11th of October, 1913, by Walter T. Wimbrough, of that county, the appellant, to annul a marriage between him and the appellee on the ground that it was the result of duress "practiced upon him" by the father of the appellee.

It alleges that on the 19th of March, 1913, "an alleged marriage took place in the town of Berlin, in Worcester County," between the plaintiff and defendant; that the plaintiff "was compelled to go through a marriage ceremony with the defendant only because of duress practiced upon him by John T. Adkins, the father of the defendant, and because of fear of instant death or grievous bodily harm at the hands of the said Adkins by reason of threats then and there made by" him "against" the plaintiff if he "should refuse to go through the marriage ceremony with the defendant"; that he left the defendant at her father's house immediately after the ceremony, which took place there, "and has not since lived," cohabited with, seen or communicated with her in any way, and that the marriage was procured as aforesaid without his consent, "and under his protest, uttered at the time of the performance of the ceremony in the presence and hearing of the defendant," her parents, "and the minister of the Gospel who performed the ceremony."

The answer of the defendant admits that the plaintiff left her at her father's house immediately after the marriage,

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and that he has not lived or cohabited with her or seen her since; but it denies that he never consented to the marriage, or that he was compelled to go through the marriage ceremony by duress practiced upon him by her father, or because of fear of death or bodily harm at the hands of her father, or that the marriage was procured by fraud, force or duress, and avers that the marriage license was procured by the plaintiff; that the minister who performed the ceremony was secured by him, and that "he expressed not only his willingness but a desire to marry the defendant, only at the last moment asking that the ceremony be deferred for a day, which the defendant then declined to do." The answer further alleges "that since said marriage a child has been born, the offspring of the plaintiff"; that since the birth of the child on the 5th of July, 1913, the plaintiff has contributed "nothing to its support," or "towards the maintenance of the defendant" since the marriage beyond the sum of sixteen dollars paid her shortly thereafter.

CHANCELLOR BLAND says in *Fornshill v. Murray*, 1 Bland, 479, that, "Marriage has been considered among all nations as the most important contract into which individuals can enter, as the parent not the child of civil society," and a reference to some of the authorities bearing upon the important and delicate questions involved, will greatly aid us in the examination of the evidence in the case.

While section 14 of Article 16 of the Code of 1912 provides that the Circuit Courts of the counties and the Superior Court of Baltimore City, upon petition of either of the parties, and the Circuit Courts of the counties and the Criminal Court of Baltimore, on indictment, may inquire into, hear and determine the validity of any marriage, "and may declare any marriage contrary to the table of this article, or any second marriage, the first subsisting, null and void," the authority of courts of equity in this State to determine the validity of a marriage charged to have been procured by abduction, terror, fraud or duress, rests upon their general

jurisdiction to set aside contracts affected by fraud, etc. *Fornshill v. Murray*, *supra*; *Le Brun v. Le Brun*, 55 Md. 496; *Ridgely v. Ridgely*, 79 Md. 298.

The caution, however, with which courts exercise this jurisdiction is clearly and forcibly stated in *Le Brun v. Le Brun*, *supra*, where JUDGE MILLER says: "But while the courts are thus clothed with jurisdiction, the peculiar nature of the subject to be dealt with, requires that the power should be exercised with extreme caution, and only where the allegations of the bill are sustained by clear, distinct and satisfactory evidence. This position is sustained by an unbroken current of authority. Marriage has been considered, among all civilized nations, as the most important contract into which individuals can enter, as the *parent*, not the *child*, of civil society. The great basis of human society throughout the civilized world is founded on marriages and legitimate offspring; and where an existing marriage is proved, it is not to be exposed to the danger of being set aside by any species of collusion, or by the mere declarations of either of the parties, and should only be brought into question upon the most undisputed proofs." After referring to the presumptions in favor of the validity of a marriage where there is issue, or where it is assailed upon the ground that a former marriage of the woman is still subsisting, he says further: "We can not, therefore, pass a decree in this case which will bastardize the issue and impute crime to the woman, unless the fact that her former husband was alive, at the date of her second marriage, is clearly established by such proof as all of the authorities upon the soundest of reasons indicate and require." In the case of *Seyer v. Seyer*, 37 N. J. Eq. 210, the VICE-CHANCELLOR said: "And as to this branch of the case, it may be said that when the Court is satisfied that ante-nuptial incontinence has taken place, the charge of threat or menace unlawful, or fraud or duress, must be most fully and satisfactorily established before the Court will annul the marriage." In *Rooney v. Rooney*, 54

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N. J. Eq. 231, 34 Atl. 682, the CHANCELLOR said: "It is hardly necessary to cite authority for the position that a complainant who comes into court under the circumstances above stated, and asks a decree of nullity, the result of which is to declare one whom he has sworn to love and cherish as a wife to be no more than a concubine, and her offspring, the fruit of the unlawful communion (born pending the suit), a bastard, must prove his case with the utmost strictness. The same rule applies in such a case as on an indictment for bigamy. The Court in such cases is bound to act as the guardian of the helpless infant, and watch his rights and interests with jealous care"; and it is said in 26 *Cyc.* 913: "The burden is on the plaintiff to sustain his material allegations, and in view of the peculiar nature of the contract of marriage and the grave consequences of dissolving it, the courts will not grant a decree except upon the production of clear, satisfactory and convincing evidence. * * * According to the generally accepted rule, such a decree will not be given on the mere admissions or confessions of the parties alone without satisfactory extraneous evidence, or upon the uncorroborated testimony of plaintiff."

In *Todd v. Todd*, 149 Pa. St. 60, 17 L. R. A. 320, where the statute of Pennsylvania authorized a divorce where the marriage was procured by fraud, force or coercion, the Court said: "It is not alleged that there was any force used to compel the marriage, and, in order to justify a divorce, under the statute, upon the ground of threats, they must be such threats, against the life or to do bodily harm as would overpower the judgment and coerce the will. There must be such a mental condition as a result of the threats that the libellant did not and could not in reality consent to the marriage," and it is said in 14 *Cyc.* 596, "A divorce will not be decreed on the ground of duress unless it appears that the marriage was contracted under force or threat of bodily harm." Where a man marries to escape arrest or imprisonment for seduction or bastardy he cannot avoid the marriage

on the ground of duress, nor is a marriage induced by threats of lawful prosecution, arrest or imprisonment, to redress or punish a wrong open to impeachment on that ground. 1 *Bishop on M. & D.*, sec. 543; 26 *Cyc.* 906; *Sickles v. Carson*, 26 N. J. Eq. 440; *Todd v. Todd*, *supra*; *Collins v. Ryan*, 43 L. R. A. 814, and note; *Ingle v. Ingle*, 38 Atl. Rep. 953; *Frost v. Frost*, 6 Atl. Rep. 282; *Scott v. Shufeldt*, 5 Paige, 43.

The plaintiff testified that he had several talks with Mr. Adkins about marrying defendant; that on Monday previous to the marriage, which took place on Wednesday evening, Mr. Adkins and his wife came to his father's shop and told the plaintiff in the presence of his father and his brother that he had to marry the defendant "else he would die by me"; that "it wasn't need for me to try to get away," for if he did "they would put an officer on my track"; that he went around to Mr. Adkin's house that night and they arranged for Mr. Adkins to get the license the next day and for the marriage to take place at seven o'clock Wednesday evening; that the threat Mr. Adkins made on the Monday referred to was the only threat he made before the evening of the marriage; that he also went to see the defendant Tuesday evening before the marriage. That on Wednesday evening at the time appointed for the marriage he went to the defendant's house, and when he knocked on the door Mr. Adkins came to the door, and that he then told him that he could not decide until the following evening whether or not he would marry the defendant; that Mr. Adkins called his wife to the door and told her what the plaintiff had said, and that they invited him in the house; that Mr. Van Dyke, the minister, and the defendant were there; that as soon as they got inside of the house Mr. Adkins flew into a rage and told Mr. Van Dyke that he had refused to marry the defendant, and said I would "have to marry her" before I went out of the house; that he, plaintiff, then said that if he had to marry her he would do it, but that he would not live with her or support her unless he had to do it; that Mr. Van Dyke did

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not want to perform the ceremony under those conditions, but that Mr. Adkins insisted, and that they were married and that he left the house immediately afterwards; that he did not want to marry the defendant and did it to save his life; that as soon as he told Mr. Adkins that night that he would not then marry his daughter he rushed into another room in a fit of passion and got some kind of weapon; that his wife and daughter tried to stop him, and said "don't do that Tom," but he got the weapon and when he came back he said to the plaintiff "you will marry this girl before you leave the house"; that he had his right hand in his coat pocket so that he could shoot right through the pocket, and that he, plaintiff, thought he had a pistol and thought he would kill him, as he was defenseless and had no means of escape. Mr. Wimbrough, the father of the plaintiff, testified that on Sunday previous to the marriage he went to see Mr. Adkins; that they "talked on some matters" in regard to the plaintiff and defendant, and that Mr. Adkins said he could not give him any answer until he talked with his wife, and that he would be around to his shop to see him Monday afternoon; that he and his wife came to the shop and said in the presence of the plaintiff that "he wouldn't make any compromise of any kind" and that the plaintiff "had his daughter to marry;" that if he did not want to live with her he did not have to do so or support her, and said to the plaintiff, "you needn't think you will run off for I will die by you," that he would "put an officer on him."

Mr. Van Dyke states that the first he knew of the matter was when the plaintiff spoke to him as he was passing the shop and told him of the trouble; that the plaintiff said he "gussed he would have to marry the girl," and asked him if he would go around to Mr. Adkins' house Wednesday night, and that he agreed to do so; that on Wednesday afternoon Mr. Adkins brought him the license and asked him if he was coming around and that he said yes; that he went to the house at the hour appointed, and that after a while the plaintiff came, and after some conversation between Mr.

Adkins and the plaintiff on the porch, they came into the house and Mr. Adkins announced that the plaintiff was unwilling to marry the defendant that night; and that when Mrs. Adkins asked why, he said the plaintiff wanted more time, that Mr. Adkins said that he would "do it tonight or not at all, the next move is mine"; that after some further discussion about it the plaintiff said he would not unless he had to, and would not live with her or support her; that Mr. Adkins replied that it did not make any difference whether he lived with her or supported her; that he had kept her ever since she was a baby and could still do so; that he, Mr. Van Dyke, said that he could not marry them under those conditions, and advised them to take more time to consider the matter or to go to a magistrate and have a civil marriage; that Mr. Adkins insisted that the ceremony be performed; that the plaintiff said "if he had to do the thing he could do it but only under those conditions; that he, witness, asked Mr. Adkins if he was willing to have his daughter marry under those conditions and he said he was; that he asked the defendant if she was willing to enter into such an agreement and she said she was; and that he then married them. He was asked if he had heard the testimony of the plaintiff in reference to Mr. Adkins rushing into another room for a weapon, etc., and what he saw and how it appeared to him, and he replied that Mr. Adkins did leave the room and go into another room, followed in a few minutes by his wife and daughter, but that he did not know what they went for; that he did not remember seeing anything in his hand; that Mr. Adkins made no threats of bodily harm in his presence, and that the worst thing, as he sees it, in the proceedings was his statement that "you will do it tonight or not at all, the next move is mine"; that the plaintiff is a member of his church and that he left the house with him immediately after the ceremony.

The testimony of Mr. Adkins, Mrs. Adkins and the defendant, which is very full and explicit, is to the effect that the plaintiff is the father of the defendant's child; that he

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promised to marry her, and that when he came to the house on the evening of the marriage the only reason he assigned for wanting the marriage postponed for a day was that he had gotten some information from certain persons and wanted to see some others about it, but he would not tell them what it was. They deny most positively that Mr. Adkins on the evening of the marriage went into another room and got a "weapon," or that he made any threats whatever of bodily harm to the plaintiff. Mr. Adkins states that he insisted upon the marriage because the plaintiff was responsible for the condition of his daughter, and what he meant when he told the plaintiff that he would "have to" marry her was that he was the one who had seduced her; that after he saw the plaintiff and his father at the latter's shop on Monday the plaintiff came to his house that night; that the next morning the plaintiff asked him to get the license as the defendant was not of age and he could not get it; that the plaintiff was also at his house Tuesday night; that when he came Wednesday night he said that he had been talking to some parties and that he could not marry the defendant that night; that he asked the plaintiff who he had been talking to but he would not tell, and that he then said to him that he could marry her then as well as any other time. Horace Shockley testified that he was at Mr. Adkins' house on Tuesday evening before the marriage and that the plaintiff was there; that he had known the plaintiff for a long time and that they had always been great friends; that while at Mr. Adkins' house Tuesday night the contemplated marriage was discussed, and that afterwards he and the plaintiff went out on the porch and had a talk in which the plaintiff told him "he guessed he had got the defendant in trouble and guess he had to marry her, that he did not see any other way."

The plaintiff was called in rebuttal to state what he referred to when he told Mr. Adkins Wednesday night that he had heard something and did not want to marry the defendant that night, and he stated what he had heard. The matters related by him were positively denied by the defendant,

are in conflict with the testimony of her father and mother and are not supported by the testimony of either the plaintiff's informant or any of the parties referred to in the information he received.

This evidence, when carefully considered in the light of the authorities we have cited, is hardly sufficient to justify an annulment of the marriage on the ground of duress. The only threat shown by the evidence indicating any intention on the part of the defendant's father to inflict bodily injury, or to justify a fear of bodily harm to the plaintiff is the statement of the plaintiff himself that Mr. Adkins secured a "weapon" which he held in his pocket in such a position that he could shoot him through his pocket. This statement is not supported by the testimony of any of those present, and is not only positively denied by Mr. Adkins, Mrs. Adkins and the defendant, but Mr. Van Dyke, the plaintiff's witness, says that "Mr. Adkins made no threats of bodily harm in his presence," and that, as he regarded it, the worst thing in the whole proceeding was his statement; "you will do it tonight or not at all, the next move is mine." Nothing occurred to indicate that the "next move" referred to was a threat of bodily injury. If there had been, Mr. Van Dyke would certainly have observed it, and could not have testified that Mr. Adkins made no such threat. The statements of Mr. Adkins that if he attempted to run away he would "put an officer on his track," and that he "would die by" him, testified to by the plaintiff's father, or the statement that the "next move" would be his, without something more to show a purpose to inflict bodily harm or injury, would not justify that construction, and there is not a particle of evidence in the case, except the statement of the plaintiff, that he so construed them. They may have expressed a purpose to institute such proceedings against the plaintiff as the law and facts justified, and from all the evidence in the case the plaintiff must have so interpreted them, for notwithstanding his repeated interviews with Mr. Adkins in reference to marrying the defendant, he went to see her Monday night

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and Tuesday night, and to his house on the evening of the marriage with apparently no thought of any danger to himself, and certainly without any preparation to repel an attempt to inflict bodily injury. His conduct throughout, as disclosed by all the evidence, which we need not refer to at greater length, is entirely inconsistent with the claim he now makes, and if he married the defendant in obedience to an impelling sense of justice to her, or for the purpose of escaping the penalties of such redress as she or her father were lawfully entitled to, a Court of Equity will not aid him to annul his obligation and cast a stigma upon his offspring.

The statement of the plaintiff that he would not live with defendant cannot render the marriage void. In *Brooke v. Brooke*, 60 Md. 524, the Court said in reference to a similar statement alleged to have been made by the husband: "As to the proposition of law contended for by the appellants, that, assuming Henry Brooke to have been the real party to the ceremony of marriage, his having remarked to the complainant just previous to its performance, 'I will marry you, but understand I will never live with you,' rendered the marriage ceremony an idle form without binding force, while we would remark we can give no countenance to the idea that the solemn rights of marriage which it is the policy of the law and good morals to uphold, can be thus converted into a delusion and a fraud, there is in this case no foundation even to contend for the doctrine set up, as the evidence shows the facts do not exist to which it could be applicable. Even if Brooke made that declaration with the intention at the time of not treating the complainant as his wife, he nevertheless proceeded to take the vows that declared them man and wife."

Decree affirmed, with costs to the appellee.

THE BOARD OF SHELLFISH COMMISSIONERS
OF MARYLAND

vs.

JOSEPH MANSFIELD ET AL.

*Oyster laws: Chapter 265 of Acts of 1914; delimitation of
beds; constitutionality; evidence. Statutes:
construction of.*

Substantial accuracy in the location of natural oyster bars, according to the provisions made by Chapter 265 of the Acts of 1914, is feasible, and the method prescribed for the location of the natural beds presents no ground for declaring the Act unconstitutional. pp. 632-633

In providing for an appeal to the Court of Appeals from the judgment of the Circuit Court, in determining whether, under Chapter 265 of the Acts of 1914, a particular area of natural oyster beds was excluded in the surveys made under the Act of 1906, the Act of 1914 declares that the Court of Appeals is empowered to review "all questions of law and fact involved": *Held*, that the presence of the word "fact" does not render the Act unconstitutional, as in violation of Article 15, section 6 of the Constitution, which guarantees the right of trial by jury; the word "fact" may be eliminated and the scope of the review confined to questions of law, without impairing the general effect of the law. p. 634

Courts are not justified in declaring a whole Act unconstitutional, merely because one of its provisions may be open to

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that objection, unless the valid and void portions are so dependent upon each other as to raise the presumption that the law would not have been passed if the invalid portion had been omitted. p. 634

In proceedings, under the Act of 1914, to determine whether a certain area was improperly omitted in the survey made by the Shell Fish Commission for classification as natural oyster beds, as defined by that Act, evidence is admissible to show that, for more than five years prior thereto, the area in question had been under lease to private parties, for culture and stocking of oysters; such evidence is proper to rebut the presumption that oysters found there within five years indicated that the area was a natural bar. p. 635

Decided April 8th, 1915.

Appeal from the Circuit Court for Talbot County. (HOPPER and ADKINS, JJ.)

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Wm. H. Maltbie and *Alonzo L. Miles*, for the appellant.

W. Thomas Kemp, *George Whitelock* and *Joseph B. Seth* (with whom was *Wm. Mason Shehan* on the brief), for the appellees.

URNER, J., delivered the opinion of the Court.

The principal questions involved in this appeal have been decided in the case of *Cox v. Revelle*, ante p. 579. This proceeding originated in a petition filed under the Act of 1914, Chapter 265, in the Circuit Court for Talbot County, praying that certain oyster ground in Miles River, which had been previously leased to a private individual upon the theory that it was barren bottom, might be judicially determined to be a natural bed or bar, as the result of which find-

ing it would be subject to acquisition for public use by condemnation as provided in the statute. The lessee, though summoned, did not appear and make defense, but the Board of Shellfish Commissioners filed an answer to the petition, disputing the allegations of fact and denying the constitutionality of the act upon which the proceeding was based. A demurrer to the averments of the answer which questioned the validity of the statute was sustained, and upon the issue of fact a judgment on verdict was rendered declaring the leased ground to be a natural oyster bed. The Shellfish Commissioners have appealed. In addition to the questions raised on demurrer there are several exceptions to the exclusion of evidence to be reviewed.

The first objection to the Act, as stated in the answer, is that its provisions are so defective and contradictory as to make it incapable of enforcement. In support of this position the appellants refer to the provision for the ascertainment of the outlines of natural oyster bars by testimony taken in Court. It is said that while such evidence may prove whether a certain location represented on a chart is included within a natural oyster area, it is impracticable by this means to determine the exact limits of the bar. The Act, however, does not depend upon the theory that the outlines of the submerged oyster beds are capable of being ascertained with precision. By section 90 it was provided that in the original survey to be made by the Shellfish Commissioners they should use their judgment "liberally in favor of the natural beds and bars, and allow a reasonable margin of the barren bottoms rather than encroach on a natural bed or bar," and in the same section there is a further provision that "all natural beds or bars shall be surrounded by neutral zones 200 yards wide in the Chesapeake Bay and Tangier Sound, and 50 yards wide elsewhere," and that these zones shall be leased under the Act or appropriated to private use. The Legislature evidently recognized the difficulty of defining with exactness the boundaries of the bars or beds which were intended to be excluded from the leasing system established

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by the State. We see no reason to hold that a substantially accurate location of oyster fisheries in the manner authorized by the Act is not feasible, and we are certainly unwilling to declare the statute invalid on that ground. There are other provisions which are said to be open to the objection we have just noticed, but they have no relation to the case before us, and even if we discovered any force in the contention, it could not now be appropriately made the subject of decision.

It is next asserted that the Act contravenes Article 3, section 40 of the State Constitution in that it contemplates the taking of private property for a use not public, and without just compensation being first paid or tendered. This question has been considered, and determined adversely to the view here urged, in the case of *Cox v. Revelle, supra*.

Another contention is that the statute authorizes the taking of property without due process of law, and is therefore in conflict with the 14th Amendment of the Constitution of the United States and Article 23 of the Maryland Declaration of Rights. This objection is not sought to be applied to the section upon which this proceeding is founded, but to separate and distinct provisions of the law, which are not involved in the present case, and hence need not be discussed.

The further point is made that the right of trial by jury as to the issue of fact in cases of this nature is not protected by the Act, although the Constitution of the State, Article 15, section 6, declares that the right to such a trial in civil proceedings in the several Courts of law, where the amount in controversy exceeds the sum of five dollars, shall be inviolably preserved. The statute provides that upon the filing of such a petition as the one here pending, the clerk shall docket a suit at law in which the issue as to the character of the disputed ground is to be tried before a jury, or before one or more of the judges, if a jury trial is waived. An appeal may be taken by any of the parties to the Court of Appeals, which is empowered "to review all questions of fact or law involved." In committing to this Court the ultimate

determination of the issue of fact joined in the case, it is urged that the Act nullifies the right of jury trial secured by the Constitution. Assuming that the provision relied upon is applicable to a judicial inquiry under the statute as to the real character of areas alleged to be natural oyster bars and as such designed by the law to be available for public use, and assuming further that the language quoted is to be construed as meaning that the Court of Appeals should have authority to pass upon the issue of fact in such a proceeding, it does not follow that the entire Act or section, or even the whole of the clause relating to the appeal, must be held invalid. The objectionable part of the provision is contained in the single word "fact," and that term may be readily eliminated, and the scope of appellate review thus unmistakably limited to questions of law, without any impairment of the general effect of the statute. The Court is not justified in declaring the whole of an Act unconstitutional merely because one of its provisions may be open to that objection, unless the void and valid portions are so dependent upon each other as to raise the presumption that the law would not have been passed if the invalid provision had been omitted. This is a sound and familiar principle and it is clearly applicable to the present case. *Painter v. Mattfeldt*, 119 Md. 474; *Somerset County v. Pocomoke Bridge Co.*, 109 Md. 1; *Steenken v. State*, 88 Md. 708.

The two remaining objections on constitutional grounds refer to proceedings which the Act permits the Shellfish Commissioners to take on their own initiative for the re-survey or re-examination of oyster bottoms with a view to the more complete reservation of natural bars for the use of the public. The powers thus conferred have not been exercised with respect to the area here in dispute. This is not a voluntary re-investigation undertaken by the Commissioners for the purposes indicated, but it is an adverse proceeding by private parties under a separate provision of the law. The two methods of inquiry are entirely different and discon-

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nected, and it is only the involuntary mode of procedure with which we are now concerned.

The rulings on exceptions to testimony are yet to be reviewed. It was proposed by the Shellfish Commissioners, in the course of the trial, to prove that portions of the ground in controversy had been held for the purposes of private oyster culture under licenses which were issued in 1905, by virtue of a pre-existing Act, but which have since become forfeited. The issue of fact, as defined by the Act of 1914, was whether, during the five years preceding the filing of the petition in this case, the natural growth of oysters had been so abundant, on the area in question, that the public had successfully resorted to it, continuously or at intervals, during any oyster season in that period, for the taking of oysters as a means of livelihood. The theory upon which proof was offered as to the prior use of the ground for oyster culture was that this fact might account for the presence of oysters found there subsequently, and would at least tend to rebut the inference that oysters taken during the five year period were the product of "natural growth" within the statutory meaning, especially as only barren bottoms could have been legally appropriated for oyster culture under the licenses mentioned. In our opinion the proffered evidence on this subject was relevant to the question as to whether the tract under inquiry was a natural bed or bar as defined by the Act, and the record does not enable us to say that the exclusion of such proof was not prejudicial to the interest which the appellants have in the correct determination of that issue.

While we fully concur with the trial Court in its disposition of the demurrer, we must reverse the judgment for the error we have noted in the rulings upon the exceptions.

Judgment reversed, with costs, and new trial awarded.

EUGENE J. HOWARD

vs.

JAMES M. HOBBS ET AL., ADMINISTRATORS.

Gifts: inter vivos; payment of interest to donor for life; secured by mortgage. Mortgage satisfied, but not released.

To make a gift *inter vivos* perfect and complete, there must be an actual transfer of all right and dominion over the thing given by the donor, and an acceptance by the donee, or some competent person for him; and it is essential to the validity of such gift that it should go into effect at once and completely; if it has reference to a future time when it is to operate as a transfer, it is but a promise without consideration, and can not be enforced either at law or in equity. p. 640

The mere fact that the donor reserves an income for life from the thing given, or requires the donee to pay, and secure the payment of, interest to him for life, on the sum given, is not sufficient to defeat it as a gift. p. 641

A donor had the donee execute, in the usual form, a mortgage of a piece of property, to secure the repayment, in five years from date, of the sum of \$1,000, which the mortgage recited had been loaned to the mortgagor by the mortgagee, with interest, etc. By a separate agreement between the parties to the mortgage, they declared that upon the death of the mortgagee the said mortgage should be deemed paid and satisfied, and that the representatives should execute a good and sufficient release therefor, without repayment of the principal and interest; provided the mortgagor paid the interest, etc.; the mortgage was not paid at the end of the five years, and the mortgagee instituted foreclosure proceedings; the mortgagors obtained a preliminary injunction to restrain the sale; before the sale, the mortgagee died; her administrators were made parties, and moved to dissolve the injunction; on appeal from an order of

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dissolution, it was: *Held*, that from all the evidence in the case, the transaction was really a gift for a good and valuable consideration, and the mortgagee being dead, the mortgage should be considered satisfied or extinguished. p. 648

The mere fact that an instrument is in the form of a loan does not necessarily make it conclusive. Courts will inquire into the facts, and see what was intended, and not be governed simply by the form of an instrument, when, under the rules of evidence, that can properly be done. p. 641

When a mortgage is satisfied, without default, it becomes inoperative and void, and the legal estate reverts to and becomes vested in the mortgagor, without any reconveyance or release. p. 645

Decided April 9th, 1915.

Appeal from the Circuit Court for Howard County. (In Equity.) (FORSYTHE, JR., J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Albert C. Ritchie and Joseph L. Donovan, for the appellant.

Edward M. Hammond, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

The appellant filed a bill in equity to enjoin Martha C. Jones and William Haydon from selling or offering for sale his property which had been advertised by said Haydon as assignee, under a power contained in a mortgage from the appellant and wife to Mrs. Jones. She having died, after a preliminary injunction had been granted, her administrators were made parties. Testimony on the motion to dissolve the injunction was taken in open Court, and after a hearing the injunction was dissolved and the bill dismissed. From the decree so ordering, this appeal was taken.

The appellant and his wife executed a mortgage to Mrs. Jones which recites that the mortgagors "borrowed" from the mortgagee the sum of one thousand dollars, for which they had executed and delivered to her their joint promissory note, payable to the order of the mortgagee five years after date, with interest payable semi-annually. The mortgage contained the usual provisions, but had in it this recital: "It being a condition precedent, however, to the granting of this loan that so long as said mortgagors shall retain the title to the land hereinafter mortgaged and there be no default in the covenants herein contained, the principal sum shall not be demanded by the mortgagee, or her personal representatives, and that in the event of the death of said mortgagee before maturity of this mortgage, or any renewal thereof, the principal sum so loaned shall be deemed a gift *causa mortis*, and the personal representatives of said mortgagee shall thereupon execute a release of the same without consideration."

The mortgage is dated December 31st, 1906, and the parties entered into an agreement under seal which is dated December 29th, 1906, and, omitting the beginning and conclusion, is as follows:

"Whereas the said Martha C. Jones is the aunt of the said parties of the second part, and has loaned them the sum of one thousand dollars (\$1,000.00), secured by a mortgage on property of the said parties of the second part, situated in Howard County; and whereas it was a condition precedent to the granting of said loan that so long as the said mortgagors retain title to said property, they shall pay to the said Martha C. Jones, during her lifetime, in semi-annual instalments, the interest on said loan at the rate of five per cent. per annum, and that upon the death of the said Martha C. Jones, the said mortgage should be deemed paid and satisfied, and her personal representatives directed to execute a good and proper release and satisfaction of the said mortgage without payment of principal or interest.

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"Now, Therefore, This Agreement Witnesseth, That, in consideration of the premises, natural love and affection, and other good and valuable considerations, the parties above mentioned do hereby covenant and agree with each other, as follows, to wit:

"The said parties of the second part agree to pay to the said Martha C. Jones, during her lifetime, the interest of five per cent. per annum on said mortgage of One thousand dollars in semi-annual instalments, accounting from the thirty-first day of December, 1906, and in the event of the sale of said property or the disposal of the same in any manner during the lifetime of the said Martha C. Jones, they will pay the principal sum of One thousand dollars and perform all the covenants contained in said mortgage.

"The said Martha C. Jones hereby covenants and agrees with the parties of the second part that if the said Eugene Howard and Lillie G. Howard, his wife, shall pay the interest of 5% per annum on One thousand dollars in semi-annual instalments for and during the term of her life, from and immediately after her death, all claim to the principal of One thousand dollars shall be abandoned and become the property of the said Eugene Howard and Lillie G. Howard, his wife, and the personal representatives and assigns of the said Martha C. Jones are hereby empowered, authorized and directed in such event, to execute a good and sufficient satisfaction and release of said mortgage, without the payment of the principal or any part thereof.

"And the said Martha C. Jones hereby retains her right to said principal sum and the interest thereon in case of default in said mortgage and the terms of this agreement."

Mr. Penrose, the attorney who prepared the papers, testified that he could not explain why the agreement was dated prior to the mortgage, but that it was his impression that they were executed simultaneously. The theory of the bill is that

the thousand dollars was a gift, and it is alleged that the plaintiff had no need for a loan or advancement at the time of the payment of said sum to him, and he would not have accepted it "unless it was to be recognized as a gift to him pure and simple as shown by the agreement filed herein." The answer denies that it was a gift, and alleges that it was a loan. It is conceded by the appellant that it was not a gift *causa mortis*, but he contends, (1) that the transaction constituted a contract, whereby Mrs. Jones agreed that the thousand dollars should belong absolutely to the Howards, in consideration of their paying her five per cent. interest on the amount during her life time, and of their other undertakings as set forth in the mortgage and agreement, which he alleges they have fully performed; or (2) that if the transaction was not a contract, then it constituted a present gift *inter vivos* from Mrs. Jones to the Howards, accompanied by delivery, but subject to defeasance if the Howards did not perform certain conditions, to secure the performance of which the mortgage was given; and these conditions having now been fully performed the gift has been freed of them.

There have been so many decisions in this State, as well as elsewhere, as to whether there had been a perfected gift *inter vivos* under the facts of the respective cases, that we will only restate the general principles applicable to the subject, as stated by JUDGE ALVEY in *Taylor v. Henry*, 48 Md. 550: "To make such gift perfect and complete, there must be an actual transfer of all right and dominion over the thing given by the donor, and an acceptance by the donee, or some competent person for him; and it is essential, to the validity of such gift, that it should go into effect, that is, transfer the property, at once and completely; for if it has reference to a future time when it is to operate as a transfer, it is but a promise without consideration, and cannot be enforced, either at law or in equity. Until the gift is thus made perfect, a *locus penitentie* remains, and the owner may make any other disposition of the property that he may think proper."

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In such a case as is now before us, the main question to be determined generally is whether the money advanced was intended as a loan or a gift. The mere fact that an instrument is in the form of a loan does not necessarily make it conclusive. As is shown by the late case of *Koogle v. Cline*, 110 Md. 587, the Court will inquire into the facts to see what was intended, and not be governed simply by the form of an instrument, when under the rules of evidence that can properly be done. The mere fact that a donor reserves such rights as an income for life from the thing given, or requires the donee to pay, and secure the payment of, interest to him for life on a sum given, is not sufficient to defeat it as a gift. In 14 *Am. & Eng. Ency. of Law* 1044, in discussing "Conditional or qualified gifts," it is said: "A reservation by the donor of certain proprietary rights in the subject of the gift, such as the use and enjoyment thereof, is not necessarily inconsistent with the absolute character of the gift, and gifts accompanied by such reservations have been repeatedly upheld" and many cases are cited in the notes. One of them is that of *Hope v. Hutchins*, 9 G. & J. 77. In that case Hannah Hope executed and delivered to Thomas Hutchins a bill of sale "of a negro girl, named Betty, two cows, and all the household furniture of which she, the said Hannah, may be possessed of at the time of her decease—provided the said Hannah Hope shall not be debarred or prevented (from) holding, using and enjoying the said property above as aforementioned, and all profits arising therefrom during her natural life." A replevin was brought by Thomas Hutchins against the administrator of Hannah Hope for four negroes born after the execution of the bill of sale, and during the life time of Hannah Hope. Betty and her children remained in the possession of Hannah Hope to the time of her death. It was held that the legal estate in negro Betty passed to the grantee at the time of the execution of the deed, and that the reservation in favor of the grantor only operated as a covenant to permit the grantor to use Betty and her children (the profits) if she pleased to do so. The Court said:

"It was obviously her design to make a beneficial provision for her daughter, who was the wife of the grantee, reserving to herself, at the same time, the use of the property and its profits, for her life only, in case her necessities should require it." Of course it will be observed that in that case there was no question about the delivery, as a bill of sale was executed and recorded. But it was a gift in consideration of love and affection and the property was retained in possession by the donor. It shows that the reservation of such rights in the donor did not qualify the absolute character of the grant, except to enable the donor to use either the property granted or its increase during her life.

The mortgage and agreement in this case were executed simultaneously, and although for some unexplained reason the agreement was dated two days before the mortgage, it in point of fact refers to the mortgage as already given—stating that Mrs. Jones "*has loaned them the sum of one thousand dollars (\$1,000) secured by a mortgage,*" etc. The evidence shows that Mrs. Jones first went to the appellant's home in Howard County in 1904, and remained there from three to four months every summer until 1911, when she and her nurse spent six months there. In 1906 Mrs. Jones told Mrs. Howard, the wife of appellant and a niece of Mrs. Jones, "that she would only be here a couple of years and she had not paid us anything for coming to our place. My wife told her that we did not ask her for anything, and she said that she wanted to fix up about this money this year." Several days afterwards appellant received a letter from Mr. Penrose, attorney for Mrs. Jones, who lived in Baltimore, stating that Mrs. Jones had asked him to prepare the papers for a loan of one thousand dollars, and she said her understanding was that the loan was to be made and he was to pay interest at the rate of six per centum per annum during her life, and at her death the loan was to be cancelled and the money to become his absolutely, and added: "As the mortgage must necessarily be for some time, I suggested that it be for five years, and the interest payable semi-annually. An agree-

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ment can be drawn, signed by both of you, that at the expiration of five years it will be renewed for another term, and so on during Mrs. Jones' life." That letter was dated October 25, 1906, and was apparently just after Mrs. Jones had returned to the city from appellant's home, where she spent the summer. Again on November 28th, 1906, Mr. Penrose wrote to the appellant: "I will prepare the agreement of Mrs. Jones relative to the mortgage you have executed to secure her investment of \$1,000 during her life." That letter would indicate that the mortgage was already executed on November 28th, but it is dated and was executed December 31st, 1906, according to the copy in the record. It bears five per cent. instead of six per cent. interest, as stated in the letter. Several matters remain unexplained, but Mr. Penrose testified that "his letter of October 25th, 1906, to Mr. Howard expressed the intention of the parties, but that some change was made, because he advised Mrs. Jones not to part with control of her money in her life, but for her to keep control over it, because people sometimes forgot their understandings and obligations, and that she had better keep control of it; but Mr. Howard was not advised of this, and that the provisions in the mortgage that the money was not to be called in so long as Mr. Howard paid the interest expressed the intention of the parties at the time, in so far as it went, but it went further." He also testified that, "She said she wanted a mortgage made out for it, but that it was practically a gift."

It would perhaps have simplified matters if the recital in the mortgage had been in accordance with the terms of the agreement, and of course the agreement should have been accurately stated, if referred to at all. At the time the attorney evidently had in mind a renewal of the mortgage, as shown by his letter of October 25, 1906, but that is not in the written agreement. As the mortgage was drawn, Mrs. Jones undoubtedly surrendered all control and dominion over the fund, and had no power to demand it, if the mortgagors paid the interest and performed the covenants, unless she

lived beyond the five years when the mortgage matured, or a renewal of it. Of course, it would not have been "a gift *causa mortis*" in the event of her death before maturity, but this misnomer can not affect the question. But the agreement executed as aforesaid expressly says that "it was a condition precedent to the granting of said loan that so long as the said mortgagors retain title to said property, they shall pay to the said Martha C. Jones, during her life time, in semi-annual instalments, the interest on said loan at the rate of five per cent per annum, and that upon the death of the said Martha C. Jones the said mortgage should be deemed paid and satisfied," etc. The respective parties then "in consideration of the premises, natural love and affection, and other good and valuable considerations" covenant with each other as shown by the agreement. There can be no doubt that the agreement must be considered in this case—indeed we do not understand that to be questioned, and it was admitted in evidence without objection. That being so, can there be any serious difficulty about the case? Let us treat it as it is called, and from the face of the mortgage presumably was—as a loan, can there be any doubt under the evidence that Mrs. Jones surrendered all control and dominion over that loan? She could undoubtedly have executed a release of the mortgage to take effect at once, and she could as surely have executed a release to take effect at her death—reserving the income during her life. If the Howards retained title to the property, paid the interest as required during her life, and performed all the covenants of the mortgage (all of which they did, so far as the record shows) Mrs. Jones not only had nothing to do at or before her death, in order to complete the gift, but she *could do nothing* to change the situation, without the consent of the Howards. Under those circumstances she had no more control and dominion over the principal than an outside party would have had. If the above facts existed (as they did) then in the language of the mortgage "the principal sum shall not be demanded by the mortgagee, or her personal representatives," or, to follow that

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of the agreement, "the said mortgage should be deemed paid and satisfied," or, as her covenant in the agreement said, "from and immediately after her death, all claim to the principal of one thousand dollars shall be abandoned and become the property of the Howards."

The one thousand dollars had been delivered to the Howards in 1906, when the transaction took place, and there was, as we have just seen, absolutely nothing to be done by Mrs. Jones to perfect the gift. It is true that provision is made for the release of the mortgage by the administrators, and it is their duty to release it, but the failure to do that can not give the mortgage life, or give the administrators any right to enforce it. When a mortgage is satisfied, without default, it becomes inoperative and void, and the legal estate reverts to and becomes vested in the mortgagor without any reconveyance or release. *Brown v. Stewart*, 56 Md. 421. If it be said there was a default in the mortgage, by reason of its not being paid within five years, our answer is that under the agreement there was not any default, and it would be treated, as between the parties, as if there had been a renewal, but at any rate if it is satisfied, or in some way extinguished; that can be shown even without a release, *Berry v. Derwart*, 55 Md. 73, and an unreleased mortgage, which has been paid can not be set up against the mortgagor or those claiming under him. *Paxon v. Paul*, 3 H. & McH., 399.

Where a gift is fully executed at the time by a complete relinquishment by the donor of all his rights in the thing given, the fact that it is not to become effective until after the donor's death does not render it void as being of a testamentary character. 14 *Am. & Eng. Ency. of Law*, 1016. In this case it is apparent that the object was to give the Howards the thousand dollars, reserving the interest for life to Mrs. Jones and the mortgage was intended simply to secure the interest to her and probably to require the Howards to keep the property so Mrs. Jones could still go there (although that is not mentioned), but there is nothing in the mortgage

and agreement, when taken together, to indicate that she intended to retain dominion and control over the fund, except to secure her interest in it for life. If she had simply given the thousand dollars without taking a mortgage she might not have felt certain of the interest being paid, and she was evidently not willing to give it to them and let them dispose of the property. The clause in the agreement emphasized by the appellees—that “The said Martha C. Jones hereby retains her right to said principal sum and the interest thereon in case of default in said mortgage, and the terms of this agreement” was simply carrying out that idea. Upon default she could have demanded it, but unless there was default she did not reserve the right to it. In 14 *Am. & Eng. Ency. of Law*, 1031, it is said, “A debt due from the donee to the donor may be made the subject of a gift to the same extent as a debt due from a stranger. Such a gift, when fully consummated by the destruction or surrender of the evidences of the debt or the giving of a receipt, will operate as an extinguishment of the debt, and a subsequent promise by the debtor to pay the debt is not enforceable for want of consideration.” In *Linthicum v. Linthicum*, 2 Md. Ch. 21, it was held (quoting from the syllabus for convenience): “Upon a bill filed by an obligor, in a sealed note against the executor of the obligee, the note was decreed to be cancelled upon proof that the testator did not intend to exact payment of the money due upon it, but originally intended it as a gift, or afterwards treated it as such, and abandoned it as a debt—although this proof consisted entirely of the parol declarations of the testator, unaccompanied by any other statements, or papers of any description.” The Chancellor referred to a number of cases and said: “Cases of this description have no affinity with, and are to be carefully distinguished from, purely voluntary contracts, or gifts *inter vivos*, or donations *mortis causa*, which cannot be maintained, if the gift is imperfect by the retention by the donor of the legal power and dominion over the subject. * * *

But the case now under consideration, and all similar cases, are placed upon the ground that

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the transaction is exclusively between the creditor and debtor, and in view of all the circumstances that the intention of the creditor is clearly indicated, that the debt should be forgiven and released to the debtor himself. 2 *Story's Equity*, sec. 706(a)."

In *Snowden v. Reid*, 67 Md. 130, six judges sat. The majority held that the transaction was not a gift of money, but a loan. JUDGES ROBINSON and IRVING dissented from the decision, which reversed the decree below, and JUDGE MILLER filed an opinion in which CHIEF JUDGE ALVEY concurred, in which they said they assented to the decree and to overruling a motion for reargument solely upon the ground that they did not regard the evidence sufficient to establish a gift, and not upon the ground that a creditor can not make a gift to his debtor of the debt due to him by the latter, except by a delivery of the note or other instrument evidencing the debt, or by an assignment or release in writing of the debt itself, as JUDGE BRYAN had held in the opinion which he delivered, in which JUDGE STONE concurred. JUDGE MILLER said that the decision in *Linthicum v. Linthicum*, made in 1849, had never been expressly or inferentially overruled in this State. It was only questioned in *Snowden v. Reid* by the opinion of two judges.

In *Albert v. Albert*, 74 Md. 526, JUDGE McSHERRY said that when the money was originally furnished by the elder Mr. Albert to his son, it was undoubtedly a loan, but the whole character of the transaction was changed in 1872 by the transfer of the amount due to the father to the credit of the son. The Court concluded, from all the circumstances and the understanding of the parties, that A. J. Albert, Sr., gave to J. Taylor Albert the sum of \$15,000 in controversy, "and that he was powerless to revoke that gift either before or after the death of his son." In the note to *Pennington v. Gittings*, 2 G. & J. 208, Mr. Brantly refers to a number of cases on "Forgiveness of Debts."

Here we are not dependent upon the declarations of the donor or parole statements, but we have a solemn agreement

under the hands and seals of the respective parties, written by the attorney of the donor. If we treat the transaction as a loan, it does seem that if it is ever possible for a creditor to forgive his debtor the principal of the debt—reserving to himself the income thereon for his life—without actually surrendering the evidence of the debt, it was done in this case. Such rights in the mortgage as were reserved either by the contract or by law to Mrs. Jones would not make the gift void. The covenants entered into in the agreement were in consideration of the premises, natural love and affection, “and other good and valuable considerations,” and the other valuable considerations may have been the care and board of Mrs. Jones. The fact is, according to the record, that the Howards kept Mrs. Jones three or four months every summer for eight years without charge, and the sum of a thousand dollars given them, on which they agreed to pay her interest during her life, was a very small compensation for that. It was attempted to be shown that in the year 1911 they did not treat her kindly, but that is not established and hence need not be discussed. The testimony of Mrs. Howard and her physician show ample cause for her not spending more time in the room of Mrs. Jones, under the circumstances. Without further prolonging this opinion, in our judgment the mortgage and note can be held to be satisfied either on the ground that there was a perfected gift of the debt as shown by the agreement, or that there was a contract for a valuable consideration that the loan should be extinguished at the death of Mrs. Jones, if the Howards did all that they covenanted to do.

It follows that the decree must be reversed and the cause remanded. As there is a prayer for general relief, the appellees should not only be enjoined from selling the property, but the mortgage and note should be cancelled.

Decree reversed and cause remanded for further proceedings, in accordance with this opinion, the appellees to pay the costs out of their decedent's estate.

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Syllabus.

FRANK B. WALKER

vs.

MARGARET D. WALKER.

Divorce: foreign states; jurisdiction; bona fides of residence.

Where a party leaves the State of Maryland, where he was married and had his matrimonial domicile, with a view and sole purpose of obtaining in another State a divorce from his wife, without any intention of abandoning his domicile in Maryland, or of becoming a resident of the other State for any purpose other than for the divorce, but with a well-defined intention of returning to Maryland as soon as his object is attained, he does not acquire a *bona fide* domicile in the other State, and the courts of that State do not acquire jurisdiction to grant him a divorce; such a decree, so given, would be a glaring and deliberate fraud on such Court, and is not one which should be recognized in Maryland, either under the "full faith and credit clause" of the Constitution of the United States or under the principles of comity.

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Decided April 9th, 1915.

Appeal from Circuit Court No. 2 of Baltimore City.
(AMBLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Henry H. Dinneen (with whom was *George P. Bagby* on the brief), for the appellant.

The cause was submitted on brief by *Thomas C. Weeks* and *Harry B. Wolf*, for the appellee.

THOMAS, J., delivered the opinion of the Court.

The bill in this case was filed by the appellee against the appellant in Circuit Court No. 2 of Baltimore City, on the 13th of July, 1914, for alimony, counsel fee and the custody of their child.

The evidence shows that the plaintiff and defendant were married in Baltimore City in July, 1907, and have one child, Frances B. Walker, who on the 29th of March, 1914, was seven years of age. Immediately before the marriage, which took place in an attorney's office while certain proceedings were pending against the defendant, they entered into the following agreement:

"This agreement made this 11th day of January, A. D. 1907, by and between Margaret E. Doyle and Frank B. Walker, her intended husband, both of Baltimore City and State of Maryland:

"Whereas a marriage is intended shortly to be solemnized between the said Margaret E. Doyle and Frank B. Walker, in view of which they desire to provide for the income and support to be received by the said Margaret E. Doyle after the said intended marriage as the sole support to be given her for herself and the issue of said marriage:

"Now, therefore, this agreement witnesseth, That in consideration of the said intended marriage the said Margaret E. Doyle shall, after said intended marriage, possess and enjoy all property real and personal which she may now or shall hereafter hold free from any claim or interest of the said Frank B. Walker and with full power to her to dispose of the same by deed or otherwise without the help or hindrance of him, the said Frank B. Walker.

"And in consideration of the agreement in the paragraph last above recited it is understood and agreed that the said Frank B. Walker shall, after said intended marriage, possess and enjoy all property real and personal which he may now or shall hereafter hold, free from any claim or interest of the said Margaret

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E. Doyle, and with full power to him to dispose of the same by deed or otherwise without the help or hindrance of her, the said Margaret E. Doyle. And the said Frank B. Walker, in consideration of the said intended marriage, hereby covenants and agrees with the said Margaret E. Doyle, his intended wife, that from and after their marriage he will give to her for her support and the support of their issue, the sum of ten dollars per month during the continuance of said marriage; the same to be paid to her between the 1st and 10th days of each and every month, and the said Margaret E. Doyle, his intended wife, is to receive said sum as the sole support for herself and her issue to be paid by or demanded of the said Frank B. Walker by her, the said Margaret E. Doyle, after her said marriage or anyone for her or in her behalf.

"As witness our hands and seals.

Margaret E. Doyle. (Seal)

Frank B. Walker. (Seal)

Test—William McCawley."

The plaintiff and defendant never lived together after their marriage, although the plaintiff says she "repeatedly wrote to him and urged him to live as man and wife should live" for their "baby's sake." The plaintiff and their child have always lived with her brother's family in Baltimore City. The defendant, whose home was in Maryland, and who held a position in the Internal Revenue Department of the United States, for the District of Maryland, at a salary at from three to four dollars per day, continued to pay the plaintiff the ten dollars per month until the 7th of May, 1913. On the 13th of February, 1913, he wrote her from Cumberland, Maryland, where he was then stationed, as follows:

"My Dear Margaret: I have made arrangements to be in Baltimore on Sunday, February 16th, 1913, and will stop at the Caswell Hotel. If you will inquire for me there about 11 A. M. I have something to say to you regarding our future which, I am sure, will interest and satisfy you. In event you should not

be able to keep this appointment, telegraph me before 3 o'clock Saturday.

"Hoping we may be able to reach satisfactory understanding, I remain,

Sincerely,

F. B. Walker."

As requested in this letter the plaintiff met the defendant at Hotel Caswell. After greeting her and inquiring about the family, he asked her if she had been reading about the laws to be enacted in the western states, and said, "I do not know whether you have been reading up on them, but I have; and after a short time the required residence out there will be twelve months, but now it is only six months, and I have a little paper drawn up by an attorney, and I want you to read it over; a little proposition. I feel I have not done right in this matter and I voluntarily offer this proposition." After some further talk she says he left the parlor and got his coat and hat and they went to Camden Station where they remained until after ten o'clock, during which time he showed her the proposed agreement and told her that if she "did not appear and have a divorce in this State, he could not obtain a divorce in this State," and if she did not sign the agreement he would leave the State and go to some other State where he could get a divorce. They did not sign the paper, but he gave her a copy of it which she took home, and she says that she never saw him again until during the trial of this case. The proposed agreement was as follows:

*"Synopsis of Substituted Agreement Between Mr.
and Mrs. Walker.*

"In lieu of the agreement now existing between the above parties, and in substitution thereof, it is agreed on the part of Mr. Walker as follows:

"(1) To pay and deposit in some trust company of Baltimore City approved by Mrs. Walker the sum of dollars, on or before the 15th day of each and every month, for a period of ten years, accounting from the date of said substituted agreement.

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"(2) To give bond, with security to be approved by Mrs. Walker, in the penalty of two thousand dollars, for the faithful and prompt payment of said monthly sum of money to said trust company.

"(3) That said deposits shall bear interest at the rate of three per cent. per annum, and the full amount of said deposits and interest, to be held by said trust company in trust for the benefit of Frances B. Walker, and at the expiration of ten years the principal so paid to said trust company, together with the interest thereon, to be applied to the education of the said Frances B. Walker, in any school or college which the said Mrs. Walker may select.

"(4) In the event of the death of the said Frances B. Walker before the expiration of said ten years, said money so paid to said trust company, together with the interest thereon, shall become the absolute property of the said Mrs. Walker, and the aforesaid payments shall continue to be made by the said Mr. Walker for said period of ten years, and no longer, whether the said Frances B. Walker shall live or not, and all payments made after the death of the said Frances B. Walker, if she should die, shall be the absolute property of the said Mrs. Walker.

"(5) Mr. Walker further agrees to pay all expenses required by law to be paid, together with attorneys' fees (the lawyer or lawyers to be selected by the said Mr. Walker), incident to a suit to be brought immediately after the execution of said substituted agreement by the above named parties, by the said Mrs. Walker against Mr. Walker, to procure a decree of absolute divorce from him on the ground of desertion.

"Mrs. Walker agrees as follows:

"(1) In consideration of the foregoing to be done by Mr. Walker, promptly after the execution of a substituted agreement, to bring suit in her name, through an attorney or attorneys to be selected by Mr. Walker, against Mr. Walker for the purpose of procuring a

decree of the Court divorcing her *a vinculo matrimonii* from Mr. Walker.

"(2) That she will not in said suit ask for temporary or permanent alimony from Mr. Walker, the aforementioned payments to be made by Mr. Walker being in lieu of any and all alimony or claims on the part of Mrs. Walker against Mr. Walker.

"(3) That she will testify as party plaintiff in said divorce suit, upon being called upon to do so, and will do everything reasonably in her power to prosecute said suit to a final decree of divorce."

In March, 1913, the plaintiff received the following letter from the defendant:

"Cumberland, Md., March 20, 1913.

"My Dear Margaret: I learned with a great deal of regret of your indisposition, and while I would have been sorry to hear it at any time, I am particularly sorry that it should have occurred just at this time. I have been looking forward to your promised letter, but it has not come, and as it has been over a month since I talked with you, I am sure you have had ample time to consult your friends and make your decision. Please bear in mind that the time grows shorter each day and, in fact, has become quite limited. If you are too ill to write me, have someone telegraph, but in either event I must have an answer positively by the 24th. Remember, also, that as you haven't kept your bargain, you must not expect me to do some of the things which I promised. I am in earnest, and from a personal standpoint it does not make any difference to me either way, only for the reasons which I gave you in Camden Station.

"Hoping that your reply may not be too late, I am,
Sincerely,

Frank B. Walker."

The plaintiff says that the statement in the letter "that the time grows shorter" referred to the time within which

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he had to leave Maryland in order to acquire the required six months residence in the western State.

On the 25th of May, 1913, the defendant left the State of Maryland and went to Salt Lake City and from there to Reno, Nevada. He did not resign his position in the Internal Revenue Department, but "got permission to be absent," and resumed his work there when he returned to Maryland on the 24th of June, 1914. He says he had a friend in Salt Lake City, who was a miner and whom he had met in Pittsburg about a year previous, and that he stopped off there with the view of getting a position. He could not tell, however, where his friend lived, in what building his office was or on what street it was located. He was in Salt Lake City for three or four days and then went to Reno because he was told that he would have no trouble in finding employment there. He stayed in Reno from the 27th of May, 1913, to March, 1914, when he returned to Maryland. While he was there he "worked around with different people," and made enough money to pay his board. When asked to state what he did he said that he worked with a repair gang on the Southern Pac. Railroad, and kept books at night for a drug company, which paid him four dollars a week. The defendant offered in evidence the record of a divorce proceeding in the Second Judicial District Court of the State of Nevada, for Washoe County, instituted by him against the plaintiff, and the statutes of Nevada, etc., relating to marriage and divorce. These statutes provided that a divorce might be obtained in the District Court of the county in which the plaintiff had resided for six months before suit, for "willful desertion at any time, of either party by the other, for the period of one year," and that if the defendant was a non-resident or could not, for any cause, be personally summoned, the Court could order notice of the suit to be given in such manner as should appear most likely to convey knowledge of the suit without undue expense or delay, and, upon failure of the defendant to appear and defend the suit, to decide the case. The record in that case

shows that the bill was filed by Frank B. Walker against Margaret E. Walker on the 6th of December, 1913, alleging that the plaintiff was then an actual resident of Washoe County, Nevada, and had been for six months previous to the institution of the suit; that the plaintiff and defendant were married on the 11th of January, 1907; that they had one child, Frances B. Walker, and "that the defendant has wilfully deserted the plaintiff for a period of more than one year immediately preceding the commencement of this action; that the said desertion was and is without the consent and against the will of the plaintiff, and that the defendant still continues to so desert plaintiff." On the same day an order was passed by the Court authorizing the following summons to be served on the defendant:

"The State of Nevada sends greeting to said defendant: You are hereby summoned to appear within ten days after the service upon you of this summons if served in said county, or within twenty days if served out of said county, but within said Judicial District, and in all other cases within forty days (exclusive of the day of service), and defend the above entitled action. This action is brought to recover a judgment and decree of divorce forever dissolving the bonds of matrimony now existing between you and the plaintiff, described in complaint dated this 6th day of December, A. D. 1913.

(Seal)

W. A. Fogg, Clerk,
Of the Second Judicial District Court
of the State of Nevada in and for
Washoe County."

On the 28th of February, 1914, the summons was returned with an affidavit of service on Margaret E. Walker, on the 8th of January, 1914, in the State's Attorney's Office in the Court House in the City of Baltimore, by Charles Kleinjohn, "Deputy Sheriff," and on the same day the District Court of Nevada passed a decree, reciting the default of the defendant, that evidence had been offered in support of the

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allegations of the bill, and dissolving the marriage between the plaintiff and defendant, and on the 2nd of March, 1914, there was filed what is called the "Judgment Roll," containing the findings and decision of the Court on the 28th of February, 1914.

The defendant further testified that he went west in order to be in a dry country, and not for the purpose of securing a divorce; that he knew when he left Maryland and went to Reno that the law then in force in Nevada required a residence there of six months in order to secure a divorce; that the law was changed in January or February, 1914, and that he came back to Maryland because he learned that his mother, who lives in Easton, Maryland, was sick. Charles Kleinjohn testified that he served the summons on Mrs. Walker in the Court House in Baltimore City, and that she was pointed out to him by Charles Kohlman, a detective; that she refused to take the paper and he shoved it under her arm. Charles Kohlman states that he was with Charles Kleinjohn when he served the summons on Mrs. Walker; that he knew her from what the assistant State's Attorney had told him, and that he saw her about a half hour later coming out of Mr. Wolf's office.

Mrs. Walker states most positively that no paper was served on her, and that the first information she had of the divorce proceedings was a notice of the divorce in the Sunday American of the first Sunday after March 2nd, 1914; that she did not know Charles Kleinjohn, and that she had never been summoned to attend Court in her life. Her sister, who was at the Court House in Baltimore on the 8th of February, 1914, says that she went there with Mrs. Walker, who went before the Grand Jury, and that while she was there, and as she was walking through the corridor, a man approached her and asked her if she was Margaret E. Walker, and that when she told him that she was not, he put a paper on her muff and it fell on the floor, and that she has never seen the paper or the man since.

Upon this evidence the learned Court below held that the

decree of the District Court of Nevada, offered in evidence, was "ineffective for want of jurisdiction to bind the parties in these proceeding," and on the 3rd of December, 1914, passed a decree awarding the plaintiff alimony and a counsel fee. From that decree the defendant has brought this appeal.

The appellant, in a very carefully prepared and elaborate brief, contends:

"First. The plaintiff failed to prove abandonment, which is the sole basis of the suit.

"Second. The ante-nuptial agreement in connection with the lapse of time between its execution and the alleged abandonment, during which period (6 years) the parties lived apart and the appellant made regularly to the appellee the payments called for by said agreement, and coupled with the fact that it was only when such payments ceased that the charge of abandonment was made, is a bar to this suit.

"Third. The decree of the District Court of Nevada for Washoe County divorcing the defendant from the plaintiff is, under the 'full faith and credit' clause of the Federal Constitution, a complete defense to this suit."

In support of the first and second propositions the appellant relies upon cases like the case of *Gill v. Gill*, 93 Md. 652, where this Court, quoting from *Bishop on Marriage and Divorce*, sec. 1662 and 1663, said: "Desertion as a matrimonial offense, is a voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent, or the wrongful conduct, of the latter," and the case of *Barclay v. Barclay*, 98 Md. 366, where the Court held "that a deed of separation followed by a living apart by mutual consent together with the lapse of time constituted a bar to the wife's demand for a divorce on the ground of desertion" where the suit was not brought until the husband refused to contribute to her support according to the terms of the deed.

These contentions, however, lose sight of the important and distinguishing features of this case, namely: the agreement

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between the appellant and the appellee does not expressly provide that they shall live apart; the plaintiff states without contradiction that she repeatedly urged the defendant to live with her as man and wife should live, and this is not an application for a divorce.

As early as the case of *Wallingsford v. Wallingsford*, 6 H. & J. 485, alimony, in this State, was declared to be "a maintenance afforded to the wife, where the husband refuses to give it, or where from his improper conduct she is compelled to live separate from him," and this definition has never been departed from in any important particular. *Keerl v. Keerl*, 34 Md. 21. In the case of *Brown v. Brown*, 5 Gill, 249, where the decree was affirmed for the reasons stated by the Chancellor, CHANCELLOR JOHNSON said: "The parties we have seen, on the 18th of April last executed a deed of separation, by which provision was made for the support of the wife and children, and by which these parties mutually agreed during their joint lives, to live separate and apart from each other. This deed, so long as the terms of it are complied with on the part of the husband, exonerates him from the obligation to support his wife, and is a protection against any claim which can be made upon him for supplying her even with necessities," and in the case of *Barclay v. Barclay*, *supra*, JUDGE PEARCE repeats the statement in *Brown v. Brown*, that "so long as the terms of a deed of separation are complied with by the husband, he is exonerated from the obligation to support his wife, and is protected against any claim which may be made upon him for supplying her even with necessities," and then adds "and it follows from this that when he repudiates his obligation under such deed, his liability for her maintenance is revived." In the recent case *Schnepfe v. Schnepfe*, 124 Md. 330, CHIEF JUDGE BOYD quotes with approval the statement in *Schuler on Husband and Wife*, sec. 367: "There is this difference pointed out between promises and agreements in consideration of marriage, and all other agreements; namely, that the contract though broken by one of the parties, remains binding

upon the other. The reason for this is that such promises and agreements affect not only the rights of the married pair, but those of their offspring; * * * But where the performance is sought by the defaulting party, the contract cannot be enforced against the person injured through such default." It is suggested by counsel for the appellant that the language of JUDGE PEARCE referred to above had reference to the section of the Code making desertion by the wife a criminal offense, and that the statement adopted by CHIEF JUDGE BOYD does not apply to this case because the appellant is not here seeking to enforce the anti-nuptial agreement. But it is obvious that JUDGE PEARCE was not referring to the criminal liability of a husband for desertion under Ch. 73 of the Acts 1896 and Ch. 44 of the Acts 1904, authorizing the criminal courts to make a part of the fine payable to the wife was not passed until after his opinion was written, and in this case the appellant is seeking to enforce the agreement as a bar to any other allowance to the appellee. We cannot accept the view that a husband, who has agreed to pay to his wife a certain sum per month in lieu of her claim to support and maintenance, can, while deliberately repudiating his obligations under the agreement, rely upon it to defeat her marital rights. It is true this Court has held that "a separation commenced and continued by mutual consent and agreement does not constitute desertion," and "that a voluntary deed of separation between the parties, in connection with lapse of time, and other circumstances, may be sufficient to show that an application for a divorce was not made *bona fide*, but for some collateral purpose." *Barclay v. Barclay, supra*. We have also said that alimony alone can only be granted upon grounds sufficient to justify a divorce *a vinculo* or *a mensa*. *Outlaw v. Outlaw*, 118 Md. 498. But we have repeatedly held that a deed of settlement is not *per se* a bar to a suit for a divorce (*Barclay v. Barclay, supra*; *Lemmert v. Lemmert*, 103 Md. 57), and where, as in this case, the bill is for alimony alone, and the husband has refused to live with his wife or to make any provision for her maintenance,

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the fact that he entered into an agreement with her to pay her a certain sum per month which he afterwards repudiated, cannot deprive her of her right to relief. His refusal to allow her to live with him, or to provide for her support is in effect a desertion and abandonment entitling her to alimony, and that is what JUDGE PEARCE meant in *Barclay's Case* when he said "that when he repudiated his obligation under such deed, his liability for her maintenance is revived." The suggestion that that case is not open to the construction we have given it because the Court there refused to allow alimony is without force. It does not appear from the report of the case that the bill prayed for alimony, but even if it did it was asked for in connection with a prayer for a divorce, and as the latter could not be granted alimony was not allowed. Here the bill is for alimony alone, and the jurisdiction of the Court is independent of its authority to grant a divorce. *Stewart v. Stewart*, 105 Md. 297; *Outlaw v. Outlaw*, *supra*.

This brings us to the third proposition relied upon by the appellant. Courts of Equity in this State exercise jurisdiction in divorce cases where the defendant is a non-resident (Code of 1912, Article 16, secs. 36 and 39), and the "full faith and credit" clause of the Federal Constitution, and the rule of comity has been given full recognition and application in this State in respect to judgments and decrees generally. But the right of the party sought to be bound by such a judgment or decree to challenge the jurisdiction of the Court is equally as well established, and we do not understand it to be questioned in this case. *U. S. Bank v. Merchants Bank*, 7 Gill, 429; *Coates v. Mackey*, 56 Md. 416; *Glenn v. Williams*, 60 Md. 93; *Mundy v. Jacques*, 116 Md. 11.

Mr. Bishop in his work on *Marriage and Divorce*, Vol. 2, sec. 50, says: "No Court of a State wherein neither of the parties has a *bona fide* domicile has, in our interstate law, any jurisdiction over their marriage status. The presence of one or both of them, and since the State of their domicile has an

interest in their marriage, the submission of the defendant to the jurisdiction, cannot, singly or together, render the result otherwise. The question has assumed various forms, under varying circumstances, and the conclusion has in all been the same. There must be a domicile, in distinction from a temporary abiding, and the residence must be, in the words of RYAN, C. J., 'actual and *bona fide*, *animo manendi*.' And whenever the Courts of one State have taken jurisdiction without a domicile, those of the others have pronounced the divorce sentence void." In section 102 he says: "One who goes to another state simply to procure a divorce and return, not intending a permanent change of residence, does not acquire a new domicile; hence his divorce proceeding is a fraud on the Court, and void," and in section 109, he says, "the statutory term 'reside' or 'residence,' including 'inhabitant,' as employed to denote the jurisdiction for divorce, should be rendered to mean the same thing which 'domicil' does in the international law, unless the contrary is affirmatively manifest from the words of the statute. And so our Courts commonly regard the question." In *Cooley's Constitutional Lim.* 494 (6th Ed.), the learned author says: "We conceive the true rule to be that the actual, *bona fide* residence of either husband or wife within a State will give to that State authority to determine the *status* of such party, and to pass upon any question affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage, or of any alleged offense; and that any such Court in that State as the Legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions, and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the Courts of that State or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party." A like principle is recognized in *Barber v.*

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Barber, 21 Howard, 582, and in the case of *Haddock v. Haddock*, 201 U. S. 562, MR. JUSTICE WHITE, in delivering the opinion of the majority of the Court, states as two propositions "irrevocably concluded by the previous decisions of that Court; 'Fifth. It is no longer open to question that where husband and wife are domiciled in a State there exists jurisdiction in such State, for good cause, to enter a decree of divorce which will be entitled to enforcement in another State by virtue of the full faith and credit clause. It has, moreover, been decided that where a *bona fide* domicile has been acquired in a State by either of the parties to a marriage, and a suit is brought by the domiciled party in such State for a divorce, the Courts of that State, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every State by the full faith and credit clause. *Cheever v. Wilson*, 9 Wall. 108.

"'Sixth. Where the domicile of matrimony was in a particular State, and the husband abandons his wife and goes into another State to avoid his marital obligations, such other State to which the husband has wrongfully fled does not, in the nature of things, become a new domicile of matrimony, and, therefore, is not to be treated as the actual or constructive domicile of the wife; * * *. The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicile and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessities nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicile hers." MR. JUSTICE BROWN in a dissenting opinion in that case says: "Doubtless the jurisdiction of the Court granting the divorce may be inquired into, and if it appears that the plaintiff had not acquired a *bona fide* domicile in that State at the time of the

institution of the proceedings, the decree is open to a collateral attack, *Bell v. Bell*, 181 U. S. 175, and a recital in the proceedings of a fact necessary to show jurisdiction may be contradicted. *Thompson v. Whitman*, 18 Wall. 457; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Andrews v. Andrews*, 188 U. S. 14," and in the course of his opinion he says further that one of the propositions that may be admitted is: "That the Courts of one State may not grant a divorce against an absent defendant to any person who has not acquired a *bona fide* domicile in that State. The same rule applies if he has removed thither solely for the purpose of acquiring a domicile and obtaining a divorce for a cause, which would have been insufficient in the State from which he removed." In *Thompson v. Whitman*, 18 Wall. 457, it is stated in the syllabus: "Neither the constitutional provision, that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other State, * * * prevents an inquiry into the jurisdiction of the Court by which a judgment offered in evidence was rendered. The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the Court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that it did exist. Want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing." And in the case of *Andrews v. Andrews*, 188 U. S. 14, the Supreme Court held that the Courts of Massachusetts were not obliged to enforce a decree of divorce obtained in another State as to persons domiciled in Massachusetts and who go into such other State with the purpose of practicing a fraud upon the laws of the State of their domicile; that is, to procure a divorce without obtaining a *bona fide* domicile in such other State. The case of *Keyser v. Rice*, 47 Md. 203, and the case of *Miller v. Gittings*, 85 Md. 601, while not referring to jurisdiction in divorce cases, are based upon a similar principle to that stated above.

Applying the rule announced by the authorities cited it

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would seem clear upon the evidence in this case that the District Court of Nevada proceeded to the decree relied upon by the appellant without jurisdiction. A consideration of the testimony of the plaintiff himself in connection with the undisputed facts of the case can lead the Court to but one conclusion, namely, that he left this State, where he was married and had his domicil, in May, 1913, with the view and for the sole purpose of securing a divorce from the appellee, without any intention of abandoning his domicil in Maryland or of becoming a resident of Nevada for any other purpose, and with a well defined intention to return to this State as soon as his object was obtained. He did not, therefore, acquire a *bona fide* residence or domicil in Nevada, and cannot be said to have "resided" there for six months within the meaning of the statutes in force in that State at the time his bill was filed. Under such circumstances the District Court of Nevada did not acquire jurisdiction to grant him a divorce, and the decree relied upon is the result of a glaring and deliberate fraud upon that Court, and one that this Court, under no construction of the full faith and credit clause of the Federal Constitution, and upon no principle of comity is required to recognize. This is so without regard to any question in reference to the service on the appellee of the summons issued by that Court.

The record contains four exceptions to the evidence, but these are not pressed in this Court, and it is only necessary to say that we see no objection to the evidence referred to in the first, second and third exceptions, and that the evidence objected to in the fourth exception relates to the service of the summons issued by the Nevada Court, which we have not considered in reaching our conclusion.

It follows from what we have said that the decree of the Court below must be affirmed.

Decree affirmed, the costs in this Court to be paid by the appellant.

THE CHESAPEAKE AND POTOMAC TELEPHONE
COMPANY OF BALTIMORE CITY

vs.

PHILLIPS LEE GOLDSBOROUGH, ET AL., CONSTITUT-
ING THE MARYLAND STATE BOARD OF
FORESTRY, ET AL.

*State Board of Forestry: roadside trees; jurisdiction over--;
Chapter 824 of Acts of 1914; right of owners of fee under
highways. Police regulation: courts, duty of--;
arbitrary regulation. Constitutional law:
delegation of power to governmental
agencies. Private property and
public rights.*

Chapter 824 of the Acts of 1914, in requiring a permit from the State Board of Forestry for the trimming or removal of roadside trees on the public highways, does so as a regulation merely, and not as a possible prohibition of proprietary rights.
p. 672

It was designed to prevent interference with trees on the public highways, by persons acting without interest; but vested ownership is to be respected, and the law is not to be construed as meaning that a permit could be denied to one having a valid right of property in such trees.
p. 672

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Syllabus.

Subject to qualification under special conditions, the general rule is that in the case of ordinary highways the public acquires only an easement of passage and its incidents, and, subject to this servitude, the owner of the soil is entitled, except so far as required for highway purposes, to the earth, timber and grass growing thereon, and to all minerals, quarries and springs below the surface. p. 673

While the owner of the fee in a public highway has property rights in the natural products of the soil within the highway limits, his right to their use or disposition is subject to such restrictions as the nature of the servitude demands. p. 673

The right of the owner of the soil, subject to the use of a public highway, to fell or trim trees growing thereon, is capable of being exercised to the prejudice of the superior interest, and is a proper subject of legislative regulation. p. 673

The police power of a State embraces regulations designed to promote the public convenience, or general prosperity, as well as regulations to promote the public health, morals or safety. pp. 673-674

In deciding whether particular classes of acts are proper subjects of regulation under the police power, it is not the duty of courts to determine the extent or gravity of the necessity for its exercise. p. 674

The essential inquiry is whether the conditions to which the power is proposed to be applied may reasonably be regarded as a possible source of injury to the public interest that is sought to be protected. p. 674

Even though the need of regulating the removal or trimming of roadside trees should not be urgent, yet legislative action to that end is so related to the promotion of the public rights and interests in the highways as to bring the statute within the scope of the State's police power. p. 674

While the State may have the right to apply the police power to a specific purpose, yet the regulations prescribed for the enforcement of the power must not be arbitrary and unreasonable. pp. 674-675

There is no constitutional prohibition against delegating to a public board or commission, serving as a governmental agency, the duty of fixing the fees to be charged for a public service.

p. 675

In the absence of any evidence or charge that the State Board of Forestry has established, or will establish, unreasonable rates or charges, in connection with the permits and inspection, in the matter of removing and trimming trees on the public highways, it is not to be presumed that the charges would be unreasonable.

p. 675

The interests of individuals are subordinate to the public good, and the constitutional guarantees of the security of private property do not operate to prohibit the restriction of its use for the public welfare within the sphere of the police power.

p. 676

Decided April 7th, 1915.

Appeal from Circuit Court No. 2 of Baltimore City.
(AMBLER, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Shirley Carter (with a brief by *Bernard Carter & Sons*),
for the appellant.

Edgar Allan Poe, the Attorney-General, for the appellees.

URNER, J., delivered the opinion of the Court.

It is provided by the Act of 1914, Chapter 824, that the "State Board of Forestry shall, in addition to the powers

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heretofore granted it, have the power to plant trees along the roadsides, to make all rules and regulations governing their planting, to care for and protect all roadside trees of this State, and to establish one or more State Forest Nurseries for the propagation of trees for such roadside planting." The Act defines roadside trees to mean "all trees planted by the Forest Wardens, or existing trees three inches or more in diameter measured two feet from the ground that may be growing within the right of way of any public road or between the curb lines and property lines of any street in an incorporated town in this State." After other provisions, not necessary to be noted, it is enacted that the "State Forester may, in his discretion, * * * plant, care for and protect roadside trees and pay for such work out of any unexpended balance" of the funds appropriated for the purposes of the Act, "provided, however, that no trees shall be planted under the provisions of the foregoing sections without the consent and approval of the owner of the land on which they are planted." The statute further provides that: "Any person or persons who may desire to cut down or trim any roadside tree shall make application to the State Board of Forestry for a permit. Any person or persons who shall cut down, trim, mutilate or in any manner injure any roadside tree, except in an emergency as hereinafter provided for, without the permission of the State Board of Forestry, or its duly authorized representative, shall be guilty of a misdemeanor, and upon conviction shall be punishable by a fine of not less than \$5.00 or more than \$50.00 for each offense." There is a provision that for the services of the State Forester "in examining conditions when permits are applied for under" the clause we have quoted, and for "issuing permits, and supervising the work authorized by such permits, he shall be paid by the person or corporation applying for the permit," and that the rates to be so paid shall be determined by the State Board of Forestry.

The bill of complaint in this case was filed by the Chesapeake and Potomac Telephone Company of Baltimore City.

It alleges that under the powers conferred upon it by law, the company has constructed and now maintains and operates telephone lines consisting of poles and wires, and their necessary fixtures, upon and along the margins of public highways in nearly all the counties, and elsewhere, in the State, but that, as the right thus granted by law could affect only the easement of the public in the highways, it was necessary for the company to acquire by purchase from the owners of the fee in the land occupied by such highways the right and easement to construct and maintain its poles, wires and fixtures in the margins thereof, and the further right to trim or cut the branches of trees there growing, which were the property of the owners of the fee, in order to keep the branches from coming in contact with the wires, as it would otherwise be impossible for the company to operate its system efficiently, for the reason that such contact results in the current of electricity on the wires being deflected to the ground, whereby the utility of the lines is seriously impaired. The averment is then made that among the numerous owners of the fee in lands lying within the margins of highways, and of the trees growing thereon, from whom the company had purchased the necessary rights and easements previously specified, were certain designated residents of Montgomery County, whose deeds granting such privileges were exhibited with the bill, together with plats showing the sections of highway and the location of the trees to which the deeds refer. The next allegation is, in substance, that the branches of these trees were found to be seriously interfering with the operation of the company's lines, and it was preparing to trim the branches in the exercise of the right acquired under the grants mentioned, but it was advised that the State Board of Forestry claimed the right, by virtue of the Act of 1914, Chapter 824, to require the company to obtain a written permit from the board for the trimming of the trees, and to pay charges, to be by it determined, for the examination of conditions and the supervision of the work. It is averred by the bill that the only property or interest held by the State

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of Maryland or Montgomery County in the highways in question is an easement for public travel, and that neither the State nor the county has any right or title to the trees growing in the margin of the highways affected by the deeds exhibited, but that such trees were the property of the respective abutting owners at the time of the execution of the deeds, and the right to trim the trees was thereby vested in the plaintiff company, and that the Act of 1914, in so far as it prohibits the company from exercising its rights with respect to the trees, without first obtaining permission of the State Board of Forestry and paying the charges for examination and supervision by it determined, which would subject the plaintiff to an expense of at least \$10,000.00 annually for such work throughout the State, is unconstitutional and void in that it deprives the plaintiff of its property without compensation and without due process of law, within the meaning of the State and Federal Constitutions. It is prayed, therefore, that the Act may be declared invalid on the ground stated, and that the State Board of Forestry, and their officers and agents, may be enjoined from interfering with the plaintiff company in reference to the trimming of the trees referred to, and from requiring any charges to be paid by the plaintiff for the examination of conditions and supervision of such work as contemplated by the statute. An order was passed by the Court below, upon consideration of the bill, refusing the injunction prayed, and the plaintiff has appealed.

It is the evident purpose of the legislation under inquiry to promote the interests of public travel, and to develop and conserve the value of public property, by establishing a system of roadside tree planting and protection for the highways of the State. In providing means and agencies for that purpose, however, the Act does not proceed upon the theory that the public interest in the highway embraces the entire title to the land upon which it is located and that the abutting owners have no rights in the soil thus occupied which are entitled to be considered. On the contrary it is assumed by the

statute that such rights exist, and the intention is plainly indicated that they are not to be disregarded. The Act goes so far as to provide that no roadside trees shall be planted under the State's own authority without the consent of the owner of the land. It may be doubted whether it was necessary for the Legislature to impose this restraint upon the power of the State to improve its thoroughfares for the public benefit in the manner proposed, but the provision gives evidence of a disposition to recognize to their full extent subsisting private interests in the soil of the highways. The requirement of a permit from the State Board of Forestry for the trimming or removal of roadside trees, so far as it affects proprietary rights, is clearly provided as a regulation merely, and not as a possible prohibition, of their exercise. It was undoubtedly designed to prevent any such interference with trees on the public highways by persons acting without interest, but as the context of the law makes it manifest that vested ownership is to be respected, we are not at liberty to construe its provisions as meaning that a permit could be denied to one having a valid right of property in trees growing on the roadside. When application is made for a permit to cut down or trim such trees, it is contemplated that an examination of conditions may be necessary, and when the permit has been issued, the work is intended to be done under official supervision. If the applicant appears to have the requisite rights in the premises, and the conditions are found to be then suitable for the performance of the work, consistently with the public interests in the highway, it is the obvious purpose of the statute that the permit shall be granted. The provision that the trimming or removal of the trees shall be done under the supervision of the State Forester is obviously and exclusively for regulative purposes.

The owner of the fee in land used as a public highway has interests which are well recognized and are not here disputed. Subject to qualification under special conditions, the

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general rule is that in the case of an ordinary highway the public acquires only an easement of passage and its incidents, and the owner of the soil subject to this servitude is entitled, except so far as required for highway purposes, "to the earth, timber and grass growing thereon, and to all minerals, quarries and springs below the surface." *Chesapeake & Potomac Telephone Co. v. Mackenzie*, 74 Md. 47. But these rights, though important and undoubted, are subordinate to the use for which the land has been acquired by the public. They cannot be utilized in such manner or under such conditions as to interfere with the free and full enjoyment of the public easement. While the owner of the fee may have a property interest in the natural products of the soil within the highway limits, his right to their use or disposition is subject to such restriction as the nature of the servitude imposed upon the land may necessitate. A road side tree, even if conceded in a given case to be the property of an abutting owner and not required for any use incident to the easement, could not rightfully be cut down or trimmed by his direction without regard to the safety and convenience of public travel. The exercise of such a privilege may be attended with danger or delay to those using the highway, or it may possibly in some instances produce injuries to the surface of the road. It is a right which is capable of being exercised to the prejudice of a superior and vested public interest, and hence it would appear to be a legitimate subject of regulation.

The authority of the Legislature to make reasonable provision for the protection of highway easements cannot be seriously disputed. Apart from any consideration for the public property interests involved, it is clearly competent for the State to promote the convenience and secure the safety of travelers upon its highways by the application of its police power. It has been held, upon the highest authority, that "the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." *Chicago, B. & Q. R.*

Co. v. Illinois; ex rel. Grimwood, 200 U. S. 592. In *Deems v. Baltimore*, 80 Md. 173, it was said to be the inherent right of every organized government to provide "for the safety and welfare of its people." The scope of the police power is given the same liberal definition in *State v. Gurry*, 121 Md. 534; *Cochran v. Preston*, 108 Md. 220; *State v. Hyman*, 98 Md. 596, and other cases.

In deciding whether particular classes of acts are proper subjects of regulation under the police power it is not the duty of the Court to determine the extent or gravity of the necessity for its exercise. The only essential inquiry is whether the conditions to which the power is proposed to be applied may reasonably be regarded as a possible source of injury to the public interest sought to be protected. Unless the exercise of the power in the statute under review is without any apparent relation to any of the objects to which it is applicable, the legislative authority is not subject to judicial interference. In the case now before us the validity of the Act in question does not depend upon a conclusion that the right of the public to a safe and unobstructed use of the highways is *seriously* jeopardized by the unregulated cutting down and trimming of roadside trees. The imminence of such danger is, of course, less appreciable on country highways than on the streets of incorporated towns, to which the Act also applies. But even though the need of regulating the removal and trimming of roadside trees should not appear to be urgent, we are unable to hold that legislative action to that end is so unrelated to the promotion of the public rights and interests in the highways, and so plainly in excess of the police power of the State, as to justify the Court in declaring it invalid. *Schmidinger v. Chicago*, 226 U. S. 578; *Eubank v. Richmond*, *Ib.* 137; *McLean v. Arkansas*, 211 U. S. 547; *Mugler v. Kansas*, 123 U. S. 623; *State v. Gurry*, *supra*.

It is well settled, however, that while the right of the Legislature to apply the police power to a specific purpose may be ascertained or conceded, the regulations prescribed in the en-

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forcement of the power must not be arbitrary and unreasonable, and it is contended that the Act of 1914 is in conflict with this principle in delegating to the Board of Forestry the right and duty to fix the charges to be paid for the inspection of conditions prior to the issuance of permits and for subsequent supervision of the work authorized. The bill, as already noted, alleges that the plaintiff Telephone Company would thus incur an expense of at least \$10,000.00 annually in connection with the trimming of trees along its lines in the State of Maryland, but it is not stated upon what scale of charges this aggregate amount is calculated. There is no averment that the Board of Forestry has established rates which are unreasonable or excessive. The power complained of was doubtless committed to the board because a more detailed knowledge of local conditions, and more frequent opportunities for revision, than the Legislature possessed, would be necessary to a determination of the proper amounts to be charged from time to time for the services rendered. It is to be presumed that the authority thus conferred is being exercised with a fair and just regard for the interests affected. There is no constitutional prohibition against the delegation of such a function to a public board or commission, serving as a governmental agency; 8 *Cyc.* 834; *People v. Harper*, 91 Ill. 357. The objection we are considering must therefore be overruled. This is an entirely different question from that raised in the case of *Ulman v. Baltimore*, 72 Md. 587, which the appellant has cited. In that case an assessment of the cost of street improvements, charged upon the owners of abutting lots, and creating a lien on their property, without any previous notice or opportunity to be heard being given them, was held to be void upon the ground that it amounted to a taking of property without due process of law. The present case involves no analogous conditions to which the principle of that decision could be properly applied. No tax or lien is here being imposed, and it would be impracticable, as it is unnecessary, for the board to notify, in advance of the fixing of the rates, all prospective appli-

cants for permits under the Act, or to make a separate ruling as to rates in the case of each application.

In view of our conclusion that the Act of 1914 is sustainable as a valid exertion of the police power of the State we can have no difficulty in disposing of the contention that it is repugnant to the constitutional provisions against the taking of property without due process of law and the appropriation of private property for public use without just compensation. There is no divesting of property rights by the operation of the Act, and the regulation to which the exercise of such rights is thereby subjected is not prevented by any limitation upon the authority of the Legislature prescribed by the Federal or State Constitution. The interests of the individual are subordinate to the public good, and the constitutional guaranties of the security of private property were not designed and do not operate to prohibit the reasonable restriction of its use by legislation enacted, within the sphere of the police power, for the promotion of the public welfare. *Chicago, B. & Q. R. Co. v. Illinois, ex rel. Greenwood*, 200 U. S. 584; *Crowley v. Christensen*, 137 U. S. 86; *Mugler v. Kansas*, 123 U. S. 623; *Barbier v. Connolly*, 113 U. S. 27; *State v. Hyman*, 98 Md. 614; *State v. Broadbelt*, 89 Md. 578; *Deems v. Baltimore*, 80 Md. 173; *Etchison v. Frederick City*, 123 Md. 289; 6 *Ruling Case Law*, sec. 194. The statutory provisions under consideration appear to be appropriate to the public purposes sought to be accomplished, and they certainly cannot be said to be so devoid of "real or substantial relation to these objects" as to justify the Court in declaring the Act invalid. *Mugler v. Kansas, State v. Hyman, supra*.

The order refusing the injunction will be affirmed.

Order affirmed, with costs.

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Syllabus.

AGNES HOCKADAY, ET AL., TRADING AS THE CHESA-
PEAKE BELTING COMPANY,

vs.

REGINA SCHLOER, THROUGH HER FATHER AND NEXT
FRIEND, JOSEPH R. SCHLOER.

*Prayers: sufficiency of evidence; taking case from jury;
amounts to a demurrer to the testimony of plaintiff.*

Employer and employee: duty of employer;

concealed danger; assumption of risk;

duty to child employees.

Remarks by jurors.

A prayer to instruct the jury to find a verdict for the defendant, upon the ground that there is no evidence in the case legally to show that he had failed in any of the duties which he owed the plaintiff, as alleged in the declaration, amounts to a demurrer to the evidence. p. 679

In passing upon such a prayer, the Court must assume the truth of all the plaintiff's testimony, regardless of any contradiction in the evidence offered by the defendant. p. 679

The weight of evidence is a question for the jury to determine. p. 679

In general, a servant assumes the risk of all open and obvious perils incident to the service he undertakes. p. 682

But in the case of a servant of tender years, who is unable to appreciate or understand those perils from his own observation, it is the duty of the master to give him warning. p. 682

A girl of 15, inexperienced in the use of machinery, had been employed as a sweeper in a factory; she was assigned the position of refilling with cotton the bobbins for a power sewing machine, and feeding them to the machine; she had not been warned that in feeding them to the machine she should do so from the side, and not by reaching across certain rollers, which were used to draw the fabric through the machine; upon reaching across the said rollers, her fingers and hand were caught and crushed: *Held*, that the case was one for the consideration

of the jury, whether the defendants were not negligent in not having warned her of the danger. p. 684

In general, an employer is not liable for defects in machinery as to which he knew nothing and of which he had no chance to be informed. p. 684

A statement by a juror, made during a trial, that he could have attached to the machinery in question an attachment that would have prevented the injury complained of, should be excluded from the consideration of the jury, when there is no evidence that the injury arose because of the absence of such an attachment. p. 685

A defendant has the right to have the jury confined to the issues as made by the pleading. p. 679

Evidence that machinery had been out of order on other occasions is not admissible, in a suit for damages because of injury by the machinery, unless, in some way, the injury complained of is connected with such defects. p. 684

Decided April 21st, 1915.

Appeal from the Baltimore City Court. (SOPER, C. J.)

The appellee, by her father, as her next friend, brought suit against the defendant for damages for injuries received through the defendants' negligence, resulting in the crushing of her fingers and hand, in a set of rollers in the defendants' belting factory. Judgment being for the plaintiff (the appellee) upon a verdict in her favor for \$1,000, the defendants took this appeal.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

George Weems Williams and *George Winship Taylor* (with whom were *Marbury, Gosnell & Williams* on the brief), for the appellant.

Michael P. Kehoe (with whom was *Robert W. Mowbray* on the brief), for the appellee.

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Opinion of the Court.

CONSTABLE, J., delivered the opinion of the Court.

This appeal involves the right of action by an employee against her employer for personal injuries sustained while in the employer's service. So numerous have been the decisions of this Court in actions of this character that the principles governing them can be considered thoroughly established and render it entirely unnecessary to look for adjudicated cases in other jurisdictions.

At the close of the case the appellants offered two prayers, among others, asking the Court, in the first, to instruct the jury to find a verdict for them upon the ground that there was no legally sufficient evidence to show that they had failed in the performance of any of the duties which they may have owed the plaintiff, as alleged in the declaration; and in the second, to rule as a matter of law that the plaintiff was guilty of contributory negligence. The Court refused both of these prayers and submitted the issues for the determination of the jury. In considering the first of these prayers, which constitutes a demurrer to the evidence, it is hardly necessary to say that the Court is to assume the truth of the plaintiff's testimony, regardless of any contradiction in the evidence offered by the defendant, however strong and convincing that may be; for the weight of the evidence is solely to be judged by the jury. Since this prayer raises the right of the plaintiff to recover under the allegations of the declaration, it will be necessary to examine the declaration, for it is the settled law that the defendant has the right to have the jury confined to the issues made by the pleadings. *City Pass. Ry. Co. v. Nugent*, 86 Md. 360; *Fletcher v. Dixon*, 107 Md. 420.

By the declaration, it is alleged that the plaintiff, a girl under fourteen years of age, was employed by the defendants, a co-partnership, and put to work on and around certain sewing machines and a certain bobbin winding machine, without being properly cautioned as to the dangers attending the working in and around said machines, and having been given no instruction, caution nor warning, which an inexperienced

employee of her age was entitled to receive. That on a certain day, while so employed, the plaintiff dropped a bobbin which fell beyond a set of rollers, with which one of the sewing machines was equipped, and that in reaching over the rollers to recover the bobbin, the fingers of the plaintiff's right hand were caught and drawn between the rollers and crushed; that as her fingers were being drawn between the rollers, the machine was stopped, but before she could extricate her fingers, the rollers, because of the defective and unsafe condition of the machinery, were again set in motion, and the hand drawn through the rollers to the wrist. The negligence of the defendants is again specifically charged in that, (1) the plaintiff was not instructed, cautioned and warned as to the dangers attendant upon the operation of the machinery; (2) in not providing safe and suitable machinery, and (3) in starting the machinery again after the plaintiff's fingers were caught and before they could be extricated.

The proof offered by the plaintiff showed that the appellants owned and operated a factory where belting for the running of machinery was manufactured from canvas. The plaintiff, under fourteen years of age and with the certificate of the Bureau of Statistics, entered the employment of the appellant about three months before the day of the accident. She worked during the first month as a sweeper, and then was assigned to the sewing room as a bobbin winder. Bobbins are small steel spools about an inch and a half in length upon which the cotton used in sewing was wound. In the sewing room were five large sewing machines and a bobbin winding machine. The duty of the plaintiff consisted in getting the empty bobbins from the sewing machines, taking them to the winder and returning them, when filled, to the sewing machines. All of the machinery in this room was run by steam power by means of shafting along the ceiling and conveyed by belting to pulleys on the machines. The sewing machines were equipped with two needles so as to sew a double row in the belting. The belting after running

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under the needles, was carried away by means of two rollers of six inches in diameter, placed one above the other at the back of the machine and about eight inches from the needles. When in operation, these rollers revolved slowly—about six revolutions to the minute. The whole machine, including the rollers was controlled by means of a lever at the side of the operator. In starting the machine, the belting running from the shafting to the pulleys at the side of the machine was pushed by means of the lever from the loose pulley to the fixed pulley, and thus, the power conveyed to the machinery. To stop, the lever was pushed in the opposite direction, thus throwing the belting back to the loose pulley. There was no receptacle to hold the surplus bobbins on the machine on which the accident occurred. After working for a month as a sweeper, the plaintiff was sent to the bobbin winder to be taught how to wind bobbins. For two or three days she worked with her, learning how to wind bobbins, and during that time carried the bobbins back and forth. No caution or warning of any kind was given to her as to any danger that might be encountered in the act of delivering the bobbins; and, that, although the aisles on each side of the machine were open, and the bobbins could have been delivered at the side of the machine, the plaintiff testified she had been instructed to deliver them at the back, reaching over the rollers to do so. And the girl who instructed her testified that, although she had on several times seen the appellee placing the bobbins over the rollers, she had never cautioned her against doing it, for she, herself, did not appreciate that there was any danger.

The plaintiff described the circumstances of the accident as follows: "I took the bobbins from her machine and took them to my bobbin table and wound them, and then, when they were finished, I took them over to her machine, and then I put them down on the machine, and the machine shook, and shook the bobbins over to the roller, and then I went over to reach for them and my fingers went through the machine.

through the roller. After my fingers were caught in the roller, they were only in there really a little bit, and I hollered, and she stopped the machine, and the machine started off again and then it went all the way up to there (indicating the wrist), and then I hollered again and she stopped the machine and Mr. Arthur came and got my hand out with a crowbar." There was testimony to the effect that after the accident, the machine was operated, and several times the lever, used to shift the belting on the pulleys, moved and at different times both started and stopped the machinery, and that this was caused by reason of the fact that the lever was loose and thus defective. The only other testimony as to the machine being in a defective condition was testimony that one or two weeks before the accident, one of the partners and the machinist were fixing it; but the witnesses did not attempt to say what repairing they were doing to it or what if any part was out of condition.

The duty owed by the employer to an employee when that employee is a person of immature years has been the cause of many expressions by this Court, and in some very recent cases. CHIEF JUDGE McSHERRY in *Levy v. Clark*, 90 Md. 146, probably expresses the rule as clearly and comprehensively as it is anywhere stated, and it is certainly the rule in this State as established by both prior and subsequent decisions. "Ordinarily, it may be laid down as the general rule that the servant assumes the risk of all open, obvious and apparent perils incident to the service he undertakes. This rule is qualified when the servant, by reason of tender years, is unable to appreciate or understand those perils from his own observation. In such instances, it becomes the duty of the master to warn the servant of the existence of the dangers, which, though visible to others, are not evident to one of immature years—and are not evident to him because of his want of capacity, growing out of that immaturity, to himself appreciate or comprehend them. The duty to warn a child of the dangers incident to a hazardous employment does not

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arise when the child, though young and inexperienced, actually knows the peril."

The facts in the above cited case are wonderfully similar to the one we are considering. A girl of fifteen years was put to work in a laundry, upon a dampening machine and was told to put pieces of laundry through the roller with which it was equipped. The machine was equipped with a guard to protect the hand from coming in contact, but on the day of the accident the guard was off. No warning was given the plaintiff as to the danger of the fingers being caught. And in an action for injuries resulting from the hand being caught between the rollers, this Court held, that as to this girl of fifteen years, the close running rollers were not a warning of danger, or in the words of the opinion "the danger of injury was not open, obvious or apparent to one so circumstanced." To like effect was the recent case of *Coughlin v. Blaul*, 120 Md. 28, quoting with approval the case of *Levy v. Clark, supra*, in which a boy of eleven years of age was injured in a meat chopping machine. While it is true the liability of the defendant was denied on certain other grounds, yet the absence of warning and caution of the dangers was emphasized as an act of negligence, for which the defendant would have been liable for any injury directly resulting therefrom. See case of *Chambers v. Woodbury Mfg. Co.*, 106 Md. 501, for a strong statement as to the duty of employers to warn employees of immature years in reference to dangers that may not be appreciated through such immaturity.

According to the plaintiff's testimony, no warning was given to her as to any injury that might result to her from coming in contact with the rollers. The rollers were very slow moving and it was natural for a girl of her age and absolute inexperience with machinery not to appreciate that there was serious danger lurking there. Most of the cases have dealt with injuries to persons operating machines; but if the performance of one's regular duties take a person of

immature years constantly about dangerous machinery, it is equally the duty of the master to warn him as well as the actual operator. We are of the opinion that the lower Court committed no error in refusing this instruction, and submitting to the jury the facts as to warning.

On the question of whether there was negligence upon the part of the defendants in there being a defective lever, resulting in the machine being thrown in gear after it had once stopped, we are of the opinion the ruling of the lower Court was correct. While it is true there was testimony showing the lever was out of order after the accident, still there is not a particle of testimony tending to show that the appellants knew or by the exercise of reasonable care could have known that this part of the machine was defective, and that is the measure of care required towards one situated as this appellee was. *National Enameling Co. v. Brady*, 93 Md. 646. It is true there was testimony tending to show that one or two weeks prior to the accident the appellant's agents were "fixing" the machinery, but there is a total absence of what was being fixed or that the part now claimed to be defective was ever defective before, or that reasonable care would have discovered it.

It is apparent from what we have expressed above that we are of the opinion that the Court was correct in refusing to instruct as a matter of law that the appellee was guilty of contributory negligence. Under the facts it was proper that the question should have been left to the jury.

There was, however, one ruling made upon the prayers which we think constitutes reversible error. During the taking of testimony, the appellants had in Court for illustrative purposes a model of one of the sewing machines. While the machinist of the appellant was testifying a juror interrogated him, using the model to illustrate. The substance of his inquiries was as to whether there was a guard over the rollers, and upon being answered in the negative, inquired why. The witness answered that because of the construction of the machine it was impracticable to use one. The juror

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thereupon volunteered the information that he could put one on that would be practical and at the same time prevent any one's fingers from getting in contact with the rollers.

The plaintiff, by her declaration, had made no specific reference to the absence of a guard; nor was there a particle of testimony offered as to this being an element of negligence, either before or after the questions by the juror. The appellants offered a prayer, the thirteenth, asking the Court to instruct the jury that there was no evidence in the case to show that the absence of a guard caused the accident, and that they could not consider the absence of a guard in arriving at a verdict. The Court refused this instruction, and in this we think there was error. It is too plain for argument that the jury could not consider the information given by the juror. It may be that they did not, but the Court could not say that they would not, nor can we say, in fact, they did not use it. It is certain, from the record, that one juror, at least, had the idea firmly in his mind that the absence of a guard was negligence and was the cause of the injury; and the appellants were entitled to this instruction, as a protection against that which had become a vital point in the case. It is possible the jury disregarded the whole of the plaintiff's testimony, because there was a strong conflict, and yet based their verdict upon the absence of the guard. We are not able to say they did not, and so great injury may have been done the appellants.

The appellants offered several prayers, dealing with contributory negligence, only one of which was granted. We think the seventh should also have been granted, although we might not have considered its refusal reversible error, still as the case has to be retried, we think it advisable to call attention to it. The prayer is predicated upon the facts surrounding the accident as testified to by the operator of the machine where the accident occurred and contains a sound proposition of law.

Because of the refusal of the thirteenth prayer we will reverse the judgment.

Judgment reversed with costs to the appellant, and new trial awarded.

G. CLIFTON SUNDERLAND AND G. CLIFTON SUNDERLAND AND EUGENE P. CHILDS, EXECUTORS
OF FREDERICKA C. SUNDERLAND,

vs.

HENRY EBLING, JAMES HENRY EBLING AND
FRANK H. STOCKETT, ASSIGNEE.

Debtors: preferences; fraudulent conveyances; void consideration. Parent and children: promise of payment for services not presumed.

Apart from the provisions of the bankrupt or insolvent laws, a debtor has the right to prefer one creditor to another, when done *bona fide*, without fraudulent intent, and upon proper consideration. p. 688

Services rendered by children to their parents, while residing with them, without any agreement for compensation, do not constitute a valuable consideration for a conveyance by a parent to a child, and such conveyances are void as against judgment creditors. p. 690

Decided April 14th, 1915.

Appeal from the Circuit Court for Anne Arundel County.
In Equity. (BRASHEARS, J.)

The facts are stated in the opinion of the Court.

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Ridgely P. Melvin and Robert Moss, for the appellants.

Daniel R. Randall, for the appellees.

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Opinion of the Court.

BRISCOE, J., delivered the opinion of the Court.

The object of the proceedings in this case is to vacate and set aside a conveyance of real estate from a father to his son, on the ground of its being a voluntary conveyance, without legal consideration, fraudulent, in respect to the plaintiff, a judgment creditor of the grantor, and therefore null and void, as to her claim.

The deed in question is dated the 23rd day of May, 1910. and in consideration of the sum of five dollars and other good and valuable considerations, the grantor conveyed in fee simple unto the grantee, the tract of land mentioned therein, situate in the Second Election District of Anne Arundel County, containing one hundred acres more or less, together with the buildings and improvements thereon.

At the time of the transfer and conveyance of the farm or tract of land, it was encumbered by a mortgage, dated the 8th day of December, 1908, which had been given by the grantor to Mr. Eugene W. Iglehart, of Anne Arundel County, to secure a loan of one thousand dollars borrowed by him from Mr. Iglehart.

On the 12th of April, 1913, the Iglehart mortgage was foreclosed and the property purchased at the foreclosure sale, for the sum of \$2,200, by the defendant, James H. Ebling. the owner of the equity of redemption, under the deed here in dispute and by Mrs. Mace, children of the grantor, in the deed.

It is conceded that the property sold for more than sufficient to pay the Iglehart mortgage, debt, interest and costs. and it is this surplus or balance of the purchase money amounting to about \$1,000, and now in the hands of the trustee or assignee of the mortgage, for distribution, which the plaintiff seeks, by a decree of this Court, to recover and to have applied to the payment of a judgment, dated the 19th day of November, 1912, in favor of the plaintiff against the defendant, Henry Ebling and others, for the sum of \$9,-767.25 in the Circuit Court for Anne Arundel County.

It appears from the record that the debt secured by the promissory note upon which this judgment was rendered, was contracted prior to the deed to the son, and was given to secure the payment of the sum of \$12,000, borrowed from the plaintiff by the Braun Packing Company of Anne Arundel County and endorsed by the defendant, Henry Ebling and others, stockholders and officers of the company. The note is dated in November, 1909, and was secured by a mortgage to the plaintiff covering the property of the Packing Company. This mortgage was foreclosed and the property sold on or about the 26th of May, 1911, and the proceeds of sale being insufficient to pay the debt, a judgment (\$9,767.25) was obtained against the defendant Ebling and the other endorsers on the note, for the balance of the mortgage debt due the plaintiff.

The real questions in the case are, first: whether the deed from the father to the son was voluntary and without consideration; second: whether there was a valid subsisting debt from the father to the son at the date of the execution of the deed, and, third: whether the deed is fraudulent and void as to creditors.

It is well settled in this State that a debtor has the right, apart from the provisions of the bankrupt or insolvent laws, to prefer one creditor to another when done *bona fide*, without fraudulent intent and upon proper consideration. *Green v. Grover*, 3 Md. 225; *Thompson v. Williams*, 100 Md. 195; *Tyner v. Johnson*, 119 Md. 627; *Zimmer v. Miller*, 64 Md. 296; *Commonwealth Bank v. Kearns*, 100 Md. 208.

It will be seen that the alleged consideration for the deed in this case as shown by the proof is for services rendered to the father by the son after he had attained the age of twenty-one years, and while residing at his father's home as a member of his family and without an express contract either for their performance or a promise made for their payment. The authorities are clear that the law implied no promise to pay for services rendered by members of a family to each other under the facts and circumstances of a case like this.

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In 20 *Cyc.*, p. 533, it is said: "Services rendered by children who have attained their majority, to their parents while residing with them, without any agreement for compensation, do not constitute a valuable consideration for conveyance by the parents, since the law implies no promise to pay for services rendered each other by persons standing in this relation."

In *Hack et al. v. Stewart et al.*, 8 Penn. State Reports, 213, it is said: "Where a son, after he had attained the age of twenty-one years, continued for a few years to live with his father, who supported him, and to labour and work on the farm as he had previously done; and no express contract as to the payment of wages by the father for the services of the son, was proved between them: the father cannot, after he becomes indebted and involved, create a debt in favour of the son, which had no legal existence until that time, and in consideration of such debt convey his property to the son at the expense of creditors; and a conveyance from the father to the son, under such circumstances, would be fraudulent and void.

In *Bump on Fraudulent Conveyances*, p. 232, it is said: "The law implies no promise to pay for services rendered by members of a family to each other, whether by children, parents, grandparents, brothers, stepchildren, or other relations. The rule rests upon the simple reason that such services are not performed in the expectation or upon the faith of receiving pecuniary compensation. The services rendered in such cases are mutual, and it may often be difficult to decide upon which party the principal benefit is conferred. Services so rendered do not, therefore, constitute a valuable consideration for a transfer." *Irish v. Bradford*, 64 Iowa, 303; *Savings Bank v. McLean*, 84 Mich. 625; *McCord v. Knowlton*, 79 Minn. 299; *Sanders v. Wagonseller*, 19 Pa. State, 248; *Updike v. Titus*, 13 N. J. Eq. 151.

In *Updike v. Titus*, *supra*, under a state of facts somewhat similar to those here, the Court said: "So far as relates to the claim for services rendered, the mortgage is without consideration and fraudulent as against creditors. The law

implies no promise to pay for services rendered by members of a family to each other, whether by children, parents, grandparents, brother, stepchildren, or other relations. No action can be maintained for such services in the absence of an express contract or engagement to pay for them. The rule rests upon the simple reason, that such services are not performed in the expectation or upon the faith of receiving pecuniary compensation. Ordinarily, for a service rendered, the law implies a promise to pay corresponding with the value of the service; but for services rendered by members of a family to each other no promise is implied for remuneration, because they were not performed in the expectation, by either party, that pecuniary compensation would be made or demanded. The authorities upon this subject are numerous and decided, and the principle upon which they rest too clear for doubt." *Winchester v. Reid*, 53 N. C. 377; *Moore on Fraudulent Conveyances*, p. 380, and cases there cited.

There is no evidence in this case of any express agreement of the father to pay the son for his services and the subject does not appear to have been discussed between them until about the date of the Iglehart mortgage and the date of the execution of the judgment note to the plaintiff.

The son testified there was no fixed amount agreed upon as compensation and upon cross-examination testified as follows: Q. At the time your father placed the mortgage loan on his 100 acre farm, where were you living? A. I was living there then. Q. What did your father owe you at that time, if anything? A. You mean how much money? Well, I wouldn't work for nobody under \$25 a month. I worked 1907, 1908, 1909 and 1910; that would be about \$1200 I guess at \$300 a year, \$25 a month. Q. What security had you for this or what promise, if any, from your father to secure you? A. I didn't have none from him, but I went and told him he would have to give me some. Q. Did your father make any contract with you to secure you or to reimburse you after the \$1,000 was borrowed? A. Yes, we kind of agreed altogether; of course, my sisters was in the

Md.]

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thing too; and us three kind of objected after we had been working there so much. Yes, we made an agreement among ourselves, but there were no papers drawn up. Q. What was that agreement? A. The agreement was that we was to take the place; then I bought the place, and I had to promise to pay my two sisters and brothers, and that I would be responsible for their money.

John Jungers, a witness on the part of the defendants, testified: "I have heard his father say that he was not paying him in cash. This conversation arose several years ago when I told Mr. Ebling I was paying my boys from the time they were able to work; he replied that he was not paying his children because he was not able to do it."

John H. Wagner, another witness on the part of the defendants, also testified: "I have heard Mr. Henry Ebling say on some occasions when we were discussing wages for our sons that he had never paid James a dollar in his life in the way of wages and that his son had left opportunities of at least \$40.00 a month to work for him for nothing."

Mr. Iglehart, who held the mortgage on the property, at the time of its transfer to the son, testified as follows, in answer to the following interrogatories: "Q. During the existence of this mortgage, with whom did you have all your dealings? A. Mr. Henry Ebling. Q. Did you know his son, Mr. James Henry Ebling? A. No, I never had any dealings with him at all. Q. Who paid the interest on this mortgage? A. Mr. Henry Ebling. Q. Did you know that while your mortgage was in existence Mr. Henry Ebling attempted to transfer title to this property to his son, James Henry Ebling? A. No, I knew nothing whatever of that. Q. Were the interest payments made promptly by Mr. Henry Ebling, and were the covenants of the mortgage kept up? A. The interest payments were made promptly for a time, that is, up to and including the interest which fell due on the 8th of June, 1912. So far as I know, the covenants of the mortgage were kept up until that date. Q. Will you kindly state, then, just how it happened that you came to foreclose this mortgage? A. On

or about the 5th day of December, 1912, at about 11 o'clock in the morning, Mr. Henry Ebling and Mr. Daniel R. Randall called at my office. As nearly as I can recall, Mr. Randall opened the conversation by stating that the next interest on Mr. Ebling's mortgage would be due in three days (that is, December 8, 1912), and he wished to ask me a hypothetical question, to wit: If Mr. Ebling should default in the payment of said interest would I consider the mortgage in default and proceed to foreclose within a week? I answered that I would not, for the reason that it would place me in a bad light before the public as having exercised "snap judgment." Mr. Randall then stated that the taxes for the year 1912 were then due and had not been paid, in consequence of which the mortgage was already in default, and asked if that fact would justify me in an early foreclosure. I answered that it would not, as I was not willing to foreclose on such short notice. As nearly as I can recall, neither Mr. Randall nor Mr. Ebling stated their reasons for desiring an early foreclosure, and I did not ask. Shortly thereafter both gentlemen left my office. I waited about four months after this, or until sometime in April, 1913, for Mr. Ebling to pay the interest on his mortgage, which had become due on December 8, 1912. At the end of that time, and after due notice of my intention, the interest being still unpaid, I placed the mortgage in the hands of Mr. Frank H. Stockett, attorney at law, with instructions to foreclose.

It thus appears that notwithstanding the father had conveyed the farm to the son James for all of his children in May, 1910, he continued to pay the interest to the mortgagee until 1912, and performed all the covenants of the mortgage to the time when he himself asked for its foreclosure.

Apart from this no payment was ever made on account of the services alleged to have been rendered by the son and no settlement at any time whatever to ascertain the amount due by the father to the son; nor does any demand of payment appear to have been made, until the apparent insolvency of the father, and the execution of the mortgages, stated herein.

Md.]

Opinion of the Court.

Upon this evidence, or in fact, in the absence of all proof to show the *bona fides* of the transaction, the deed from the father to the son in this case must be held as a voluntary conveyance, and void as against the plaintiff, a judgment creditor.

As was said by this Court in *Benson v. Benson*, 70 Md. 256, it needs no authority for so plain a proposition that the son was not under the circumstances a purchaser for a valuable consideration and cannot be treated as such under the facts of this case. *Worthington v. Shipley*, 5 Gill. 460; *Somerville v. Stunfield*, 28 Md. 216; *Goodman v. Wineland*, 61 Md. 449; *Whedbee v. Stewart*, 40 Md. 424.

The facts of the case of *Thompson v. Williams*, 100 Md., *supra*, relied upon by the defendants, are unlike this. In that case the consideration for the conveyance to the daughter was adequate, the deed was made to secure an actual loan, and accepted in good faith, and the evidence did not show that the mortgage was made with intent to hinder and delay the creditors of the grantor.

In the present case there is no evidence whatever of the existence of any *bona fide* indebtedness, except from the testimony of the defendants, the parties in interest, and that is not satisfactory when considered in connection with the other facts and circumstances surrounding the transaction, to constitute a valid consideration for the deed.

It follows, for the reasons stated, that the Court below committed an error in sustaining the validity of the deed here in question as against the plaintiff's claim and denying the plaintiff the relief asked by the bill.

The decree will therefore be reversed and cause remanded, that a decree may be passed, in accordance with this opinion.

Decree reversed, cause remanded, with costs to the appellants.

MEMORANDUM.

CASES DESIGNATED BY THE COURT NOT TO BE REPORTED.

WILLIAM PATTERSON

vs.

ALICE PATTERSON.

Divorce: cruelty; violence; abusive language no justification.

To justify a divorce on the grounds of cruelty, the causes must be grave and weighty, and such as show an absolute impossibility for the duties of the married life to be discharged.

But the law does not require that there shall be many acts.

Where violence has been inflicted and threats made, the court should not hesitate to interfere, where the facts, when considered with the attitude of the defendant, make it clear that the violence will be repeated.

No abusive or reproachful words by a wife will justify the husband in assaulting and beating her.

Decided February 10th, 1915.

Appeal from the Circuit Court for Allegany County.
In Equity. (HENDERSON, J.)

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Charles G. Watson, for the appellant.

No appearance for the appellee.

STOCKBRIDGE, J., delivered the opinion of the Court.

LOUIS C. HECKNER

vs.

MARGARET M. HECKNER.

Divorce: both parties guilty.

Where each of the parties to a bill and cross-bill for divorce appears guilty of offenses that would be sufficient grounds for granting a divorce, the relief should be granted to neither.

Decided April 7th, 1915.

Appeal from the Circuit Court of Baltimore City. (DAWKINS, J.)

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE and CONSTABLE, JJ.

Geo. Moore Brady (with whom was *Wm. Milnes Maloy* and *John W. Reynolds, Jr.*, on the brief), for the appellant.

Henry M. Siegel (with whom was *Wm. H. Lawrence* on the brief), for the appellee.

BOYD, C. J., delivered the opinion of the Court.

DAVID M. NEWBOLD

vs.

LAFAYETTE MILL AND LUMBER CO.

Bills and notes: endorsement; bill to have declared null; jurisdiction of equity.

To warrant a court of equity in declaring the complainant's endorsements on certain notes null and void, because of the fraudulent conduct and misrepresentations of an agent of the payee, the evidence to sustain the bill must be clear and convincing.

Decided April 16th, 1915.

Appeal from the Circuit Court of Baltimore City. (DAWKINS, J.)

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, URNER and STOCKBRIDGE, JJ.

Wm. Ewin Bonn and Randolph Barton, Jr., for the appellant.

Edward M. Hammond, for the appellee.

BOYD, C. J., delivered the opinion of the Court.

DAVID PEOPLES

vs.

DAVID V. AULT.

Decree for accounting: not granted when futile; books destroyed. Witnesses: unsworn testimony; when not admissible.

Appeals: remanding for further proceedings under section 38 of Article 5 of the Code.

A decree for an accounting will not be passed when it appears from the evidence that the books containing the information desired are no longer in existence.

Where the bookkeeper, who had made the entries in books whose contents were in issue, was available and could have been produced, but had not been called or examined, his unsworn statement as to the entries is not admissible.

Where the substantial merits of a case will not be determined by either an affirmance or by a reversal of the decree appealed from, the case may be remanded for further proof, as authorized by section 38 of Article 5 of the Code.

Decided April 16th, 1915.

Appeal from the Circuit Court of Baltimore City. (ELLIOTT, J.)

The cause was argued before BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON and URNER, JJ.

James McEvoy (with whom were *W. Howard Gahan* and *W. B. Saul* on the brief), for the appellant.

J. Kemp Bartlett (with whom were *Edgar Allan Poe*, *L. B. Keene Claggett* and *R. Howard Bland* on the brief), for the appellee.

URNER, J., delivered the opinion of the Court.

FRANK E. BULLOCK

vs.

HENRY M. STAYLOR, ET AL.

Specific performance: decree compelling vendee to comply with contract of sale; title need not be free from every possible doubt; adverse possession.

Where a bill for specific performance is brought, for the purpose of testing the title of a vendee, in order for a decree to be granted, it is not required that the title shall be absolutely perfect and free from every possible doubt; a threat, or even the possibility, of a contest will not be sufficient to defeat the right to the decree; but to have such effect, the doubt must be considerable and rational, such as would and ought to produce real, *bona fide* hesitation in the mind of the court.

The mere fact that the vendor's title to land depends upon adverse possession, is no defense to a bill for specific performance.

A public street or road, adjoining a piece of property, was closed in 1882, and benefits for such closing were assessed against the owner of the property; the assessment not being paid, the property was advertised to be sold by the City of Baltimore; the day before the sale, the widow of such owner, instead of waiting to buy the property at public sale, paid the assessment to the city and obtained a receipt therefor, and the property was withdrawn from sale; the property was then assessed to her; she paid the taxes upon the same until her death, in 1909; during all that time she maintained a house and improvements upon the property, and leased out and received rent for the same: *Held*, that her possession, under such circumstances, established in her a fee simple and marketable title to the lot in question, by adverse possession.

It is the intent with which possession is begun or maintained which makes its character adversary.

Decided March 8th, 1915.

Appeal from the Circuit Court of Baltimore City.
(BOND, J.)

The facts are stated in the opinion of the Court.

The cause was submitted to BOYD, C. J., BRISCOE, BURKE, THOMAS, PATTISON, UENER, STOCKBRIDGE and CONSTABLE, JJ.

William B. Smith filed a brief for the appellant.

Charles Lee Merriken and *Frank M. Merriken* filed a brief for the appellees.

PATTISON, J., delivered the opinion of the Court.

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ADMINISTRATORS AND EXECUTORS.

1. Duty of—.

The law imposes upon all persons having the settlement of the estates of decedents the duty of protecting the estates.

Boyd vs. Shirk. p. 182

2. When a person with such a duty comes into court four and a half years after his appointment, and declares he could not by due diligence have discovered the alleged fraud, when, from his own admissions, the very thing happened which should have put him upon notice, he is guilty of laches, and to grant him relief would be aiding too far those who are dilatory in the performance of their official duties. *Boyd vs. Shirk.* p. 182

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It is the intent with which possession is begun or maintained which makes its character adversary. *Bullock v. Staylor.* p. 699.

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A public street or road, adjoining a piece of property, was closed in 1882, and benefits for such closing were assessed against the owner of the property; the assessment not being paid, the property was advertised to be sold by the City of Baltimore; the day before the sale, the widow of such owner, instead of waiting to buy the property at public sale, paid the assessment to the city and obtained a receipt therefor, and the property was withdrawn from sale; the property was then assessed to her; she paid the taxes upon the same until her death, in 1909; during all that time she maintained a house and improvements upon the property, and leased out and received rent for the same: *Held*, that her possession, under such circumstances, established in her a fee simple and marketable title to the lot in question, by adverse possession.

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AGENCY.

1. Jury: province of—.

It is not for a Court to determine the question of agency *vel non*, but to determine whether there is any evidence tending to prove agency; and if there is any such proof, although not full and satisfactory, it is the exclusive province of the jury to judge its weight.

Heise & Bruns v. Goldman. p. 559

2. Whether there be any evidence or not is a question for the jury. Whether it is sufficient evidence is a question for the jury.

Heise & Bruns v. Goldman. p. 559

3. Relations of principal and agent do not depend upon express appointment and acceptance, but may be implied from the words or conduct of the parties and circumstances.

Heise & Bruns v. Goldman. p. 559

4. Revocation of authority.

The authority of an agent, not coupled with an interest, nor conferred for a valuable consideration, may be revoked at the pleasure of the principal.

Howard v. Street. p. 300

AGENCY—*Continued.***5. Real estate broker; commission.**

But where a sale made by a principal is the result of the agent's efforts, made before his authority was revoked, the agent can not be deprived of his right to the commissions agreed upon, if it be established that the purpose of the principal, in withdrawing the authority of the agent, before the sale was actually consummated, was to avoid the payment of the commission.

Howard v. Street. pp. 300, 301

6. In such cases, the evidence of the purchaser as to whether or not his action in making the purchase had been influenced in any way by the agent, before the revocation of the agent's authority, should be received. *Howard v. Street.* pp. 303-304

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APPEALS.

1. Harmless errors; no reversal.

A harmless error in the ruling of a trial court, presents no ground for a reversal.

Ewing v. Rider. p. 152

2. In general, unless it appears by the record that the appellant was injured by the order appealed from, the appeal will be dismissed. *Manufacturers and Merchants Co. v. Pyles.* p. 322

3. Injunctions: orders refusing.

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B. & O. R. R. Co. v. Gilmor. p. 618

4. Interest of parties.

Where a party to a suit has no interest in the subject-matter of it, he has no standing to appeal from an order disposing of the property, and such appeal, if taken, will be dismissed.

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5. Record: only facts in—considered.

The Court of Appeals will not consider facts or plats that are not in the record, and whose accuracy is denied by the other side.

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Where the substantial merits of a case will not be determined by either an affirmance or by a reversal of the decree appealed from, the case may be remanded for further proof, as authorized by section 38 of Article 5 of the Code.

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1. Instigation by detectives.

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2. Where there is a conflict of evidence as to how the bribe originated, it is a question for the jury.

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CONDEMNATION OF LAND. See **EMINENT DOMAIN.****1. Derogation of private rights.**

A proceeding to condemn land is an action at law. Such proceedings are not according to common law, but are in derogation of private rights, and wholly dependent upon statutory regulations and provisions.

Mayor, etc., of Baltimore v. Kane. p. 137

2. Removal: no right of—

No right of removal in condemnation cases having been given by the Constitution, or by statute, no such right exists in cases of this character. *Mayor, etc., of Baltimore v. Kane.* p. 140

3. In condemnation proceedings, where the question of the necessity, *vel non*, for the acquisition of the property by the City of Baltimore, was allowed to go to the jury, and a verdict and judgment entered, it would be too late to apply for a removal, even conceding that the right existed.

Mayor, etc., of Baltimore v. Kane. p. 140

4. Excess condemnation; Baltimore City.

Section 175 of Article 4 of the Public Local Laws, does not authorize the City of Baltimore, in a condemnation proceeding for opening a public highway, to assess an aggregate amount of benefits in excess of the total amount of the damages and expenses. *Md. Trust Co. v. Mayor, etc., of Baltimore.* p. 49

5. The Legislature did not intend to authorize the city thus to make a profit out of such improvements, and could not have validly given the city such authority.

Md. Trust Co. v. Mayor, etc., of Baltimore. pp. 49, 52

6. —; commissioners for opening streets; duty to abate.

As the city has no power to assess benefits which materially amount to more than the aggregate of damages and expenses, it is the duty of the Commissioners for Opening Streets to deduct the excess, if they find such, by allowing each assessment its proportion of the amount deducted. Their return should show that such deductions were made.

Md. Trust Co. v. Mayor, etc., of Baltimore. p. 53

7. Upon failure of the Commissioners for Opening Streets to make such deductions, the Court can do so, on appeal to it.

Md. Trust Co. v. Mayor, etc., of Baltimore. p. 54

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8. —; assessments on adjoining owners; uniformity of taxation.

Although the usual constitutional mandate enjoining equality and uniformity in taxation, does not generally apply to special assessments for local improvements, if a statute permitted a municipality to make such assessments in excess of the cost of the improvements and the expenses incident thereto, it would unquestionably be contrary to Article 15 of our Bill of Rights, for such assessments would require those so assessed to contribute to the support of the government, to the extent of the excess, as other taxpayers are not required to do.

Md. Trust Co. v. Mayor, etc., of Baltimore. pp. 50-51

9. Jurors and witnesses: duties of—.

Witnesses and jurors should not be permitted to enter the realm of speculation and swell damages beyond a present cash value under fair conditions, by fantastic visions of the future needs of growing communities.

Brack v. Mayor, etc., of Baltimore. p. 388

10. Award to be in money.

The duty of the jury, in condemnation proceedings, is to award compensation to the property owner in money, and they can not, in lieu thereof, impose conditions upon the party condemning, or require the property owner to accept certain privileges.

Brack v. Mayor, etc., of Baltimore. p. 389

11. Compensation; damages.

The just compensation to which the landowner is entitled, where part of his land is taken for a public use, includes the value of the ground condemned, and a due allowance for consequential damages, if any, to the remainder.

Brack v. Mayor, etc., of Baltimore. p. 381

12. —; market value of property taken.

With respect to the property taken, the award must be based upon the actual market value at the time of the condemnation.

Brack v. Mayor, etc., of Baltimore. p. 381

13. —; special value.

The market value of the land is to be estimated in reference to the uses and purposes to which it is adapted, and any special features which may enhance its marketability may properly be considered.

Brack v. Mayor, etc., of Baltimore. p. 381

CONDEMNATION OF LAND—*Continued.*

14. —; value to any purchaser.

The question is not what the property is worth to the condemning party, but is confined to the question of what could probably be realized from its sale to any purchaser who might desire it for any or all of the purposes for which it is available.

Brack v. Mayor, etc., of Baltimore. pp. 381, 385

CONSENT. See CRIMINAL LAW, 1.

CONSPIRACY.

1. Motives.

In a prosecution for unlawful conspiracy, if the concerted action upon the part of the traversers is admitted (expressed), the issue remains whether their conduct was actuated by innocent motives or by unlawful purposes.

Hummelshime v. State. p. 566

2. —; question for jury.

That is a question for the jury, not reviewable by the courts.

Hummelshime v. State. p. 566

3. Bribery.

In a trial for a criminal conspiracy to bribe city officials, the defendants have the right to ask, as reflecting on the bias or interest of a particular witness, whether he is one of those who promoted the investigation. *Hummelshime v. State.* p. 567

4. But a general inquiry as to the names of the citizens who were instrumental in having the detective sent to investigate the officials is an irrelevant one. *Hummelshime v. State.* p. 567

CONSTITUTION OF MARYLAND (1851).

Art. 10, sec. 1—Public officers: pay; limit. p. 63

CONSTITUTION OF MARYLAND (1864).

Art. 12, sec. 1—Public officers: fees of—; limit. p. 64

CONSTITUTION OF MARYLAND (1867).

Art. 3, sec. 29—Title of laws: mode of enactment.

pp. 60, 546

Art. 3, secs. 32, 33, 34, 35, 36, 37, 38 and 40—Restraints and limitations upon Legislature. p. 62

Art. 3, sec. 40—Private property not to be taken without due compensation. pp. 82, 583, 586, 633

Art. 4, sec. 8—Removal of causes: meaning of "party"; trial by court without jury. pp. 136, 265

CONSTITUTION OF MARYLAND (1867)—*Continued.*

Art. 15, sec. 1—Public officers: pay; limit.

pp. 60, 61, 63, 66

Art. 15, sec. 6—Trial by jury.

p. 633

CONSTITUTION OF THE UNITED STATES.

14th Amendment—Civil rights.

pp. 60, 66, 549, 633

Art. 1, sec. 10—State rights.

p. 583

CONSTITUTIONAL LAW. See CONDEMNATION OF LAND. DECLARATION OF RIGHTS. POLICE POWER.

1.. Fees: delegation of authority to fix—.

There is no constitutional prohibition against delegating to a public board or commission, serving as a governmental agency, the duty of fixing the fees to be charged for a public service.

C. & P. Tel. Co. v. Board of Forestry. p. 675

2. Private rights and public good.

The interests of individuals are subordinate to the public good, and the constitutional guarantees of the security of private property do not operate to prohibit the restriction of its use for the public welfare within the sphere of the police power.

C. & P. Tel. Co. v. Board of Forestry. p. 676

3. Baltimore City; made to contribute to salary of State officers.

The Legislature has the right, by law, to impose upon the city a portion of the burden of the expense of supporting the Public Service Commission, a large part of whose work is mainly for the benefit of the city.

Thrift v. Laird. p. 67

4. —; Legislature's power over—.

The power of the Legislature over the City of Baltimore is not absolute and unlimited, but while it must deal with the city in subordination to the restraints and limitations of the Constitution, the Legislature possesses wide powers of control and legislation over it.

Thrift v. Laird. p. 67

5. Offices of trust and profit: one person not to occupy more than one at same time; Public Service Act.

The Public Service Commission Act, Chapter 180 of the Acts of 1910, in fixing the salaries of the commissioners at \$3,000 to be paid by the State, and an additional \$3,000 to be paid by the City of Baltimore, as to city employees, does not violate Article 35 of the Declaration of Rights, declaring that no person shall hold at the same time more than one office of profit or trust.

Thrift v. Laird. p. 69

CONSTITUTIONAL LAW—*Continued.***6. Taking of property; section 40, Article 3; changes of grade, etc.; governmental power.**

Acts done in the proper exercise of *governmental powers*, and not directly encroaching upon private property, do not constitute a taking of property within that constitutional inhibition, even though the consequences of those acts may impair the use of the property. *Mayor, etc., of Baltimore v. Bregenzer.* p. 85

7. Under the discretion and authority of a municipal ordinance, a railroad company, in order to form an approach to a bridge over another street, changed the level and the grade of the street and sidewalk in front of certain houses of the complainant. The effect was to cut off the cellar windows of the house and thereby to reduce somewhat the amount of light and air, and also, in varying degrees, to change the relative heights of the doors of the houses from the pavement, but not so as to cut off the access to the street; but during the building of the structure the access and egress of the property was much impeded: *Held* that this did not present such a "taking" as to warrant the issuing of an injunction. *Mayor, etc., of Baltimore v. Bregenzer.* p. 87

8. —; actual taking.

The constitutional right to compensation for private property so taken, does not extend to cases where the land is not actually taken, but is only indirectly injured.

Mayor, etc., of Baltimore v. Bregenzer. p. 85

9. —: damages for impairment of value.

For any damages or impairment of values to the property thus arising, an action at law would lie.

Mayor, etc., of Baltimore v. Bregenzer. p. 87

10. —; section 40 of Article 3; compensation.

The taking of private property for public use, without first making or tendering the just compensation therefor, as provided in sec. 40 of Art. 3 of the Constitution, may be prevented by injunction. *Mayor, etc., of Baltimore v. Bregenzer.* p. 82

11. —; no application to cases of mere inconvenience alone.

Mere *inconvenience* of access to property resulting from acts done, or the mere *diminution* of its light and air, does not constitute a taking of the property within the meaning of that provision. For such injury to come within this provision, it must be such as to amount to their substantial destruction.

Mayor, etc., of Baltimore v. Bregenzer. p. 87

CONSTITUTIONAL LAW—*Continued.***12. Legislature: power of—**

Plenary power is in the Legislature for all purposes of civil government, is the rule. *Thrift v. Laird.* p. 70

13. In general, except where the State or Federal Constitution, has imposed limits upon the power of the Legislature, it must be considered as practically unlimited. *Thrift v. Laird.* p. 70

14. A somewhat different rule prevails, however, in Maryland. *Thrift v. Laird.* p. 70

15. Title of statutes; Article 3, section 29.

The Public Service Commission Act, Chapter 180 of the Acts of 1910, providing for an additional payment to be made to the Commissioners as employees of the city, is not invalid because of any defect in title, under section 29 of Article 3 of the Constitution. *Thrift v. Laird.* pp. 69-70

CONTRACTS. See DEEDS: EQUITABLE CONSTRUCTION OF—. **LEASES. LIQUIDATED DAMAGES. SPECIFIC PERFORMANCE.****1. Assignment of—**

Where a contract provides for mutual rights and liabilities, the latter can not be avoided by assignment, and the rights retained. *Tarr v. Veasey.* p. 206

2. Where the rights and powers conferred by a contract involve personal trust and confidence, the contract is not assignable. *Tarr v. Veasey.* pp. 206, 207

3. Mistake as to one of the parties.

Where the agent of an individual represented to certain vendees that he represented a large corporation, whose name suggested the Goodyear Rubber Company, and as such induced them to sign a contract, as if with such presumed corporation, with which they intended to contract, when as a matter of fact, there was no such corporation existing, there was no contract.

Sisters of Notre Dame v. Kusnitt. p. 334

4. In such a case, where the goods were shipped to the vendees before they had found out that no such corporation existed, but the goods never had been opened, and no demand for the goods had been made by the vendor, and there had been no conversion by the vendees, nor refusal to return them, an action of assumpsit by the vendor for the value of the goods will not lie. *Sisters of Notre Dame v. Kusnitt.* p. 342

CONTRACTS—Continued.

5. A person has a right to contract with whom he **pleases**, and another cannot be thrust upon him without his consent; and he cannot be held to have contracted with a person other than the one he contemplated. *Sisters of Notre Dame v. Kusnitt.* p. 340

6. In general, one person can not make another his debtor without the latter's consent.

Sisters of Notre Dame v. Kusnitt. p. 342

7. Bad bargains.

The rights of parties to a contract must be determined by the terms of the agreement they have voluntarily made. Courts can not make a different contract for them, or relieve them of the consequences of a bad bargain.

Cowan v. Meyer. pp. 466-467

8. Breach; difficulties, unforeseen—; when no excuse.

A party who, by his contract, charges himself with an obligation possible to be performed, must make it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him.

Cowan v. Meyer. p. 467

9. In such a case the party committing the breach can not allege unforeseen difficulties as an excuse for his breach.

Cowan v. Meyer. p. 466

10. —; municipal ordinances.

The fact that city ordinances limited the time during which explosives for blasting could be used was held not to excuse his breach of contract.

Cowan v. Meyer. p. 467

11. —; waiver; condition of cattle sold; question for jury.

Where A. had purchased cattle upon the assurance that they would be the same as he had been buying, and the cattle arrived at a station at some distance from A.'s farm, while he was absent on a trip South, the fact that his farm manager went for them and brought them to the farm, and the fact that A. had left a blank check for the cattle with an agent who filled in the amount for the bill, and delivered it to the vendors, did not operate as a waiver of a breach of the contract, when, as soon as A. returned and saw the cattle, he complained to the vendors of their condition, and requested them to take them off his hands.

Greer v. Whalen. pp. 281-282

CONTRACTS—*Continued.*

12. In such case, the question of the condition of the cattle sold is one for the determination of the jury.

Greer v. Whalen. p. 281

13. Written—; parol proof.

Where the terms and meaning of a written contract are clear and explicit, parol proof is not admissible to explain or vary the agreement.

Nydegger v. Gitt. p. 577

CORPORATIONS. See STOCK AND STOCKHOLDERS.

1. Dividends: unclaimed—.

Upon the dissolution of a corporation its unclaimed stock or dividends revert to, or become the property of, the general creditors, or the general stockholders.

The George's Creek Coal and Iron Co. in Liquidation.

p. 608

2. —; limitations.

Where a corporation declares a dividend, limitations begins to run against the claim of the stockholder only from the time that demand for the dividend is made.

The George's Creek Coal and Iron Co. in Liquidation.

p. 606

3. Dissolution; receivers; Code, Article 23, section 79; mortgagee's rights.

By section 79 of Article 23 of the Code, upon the dissolution of a corporation by the decree of any court, its property vests in the receivers appointed by the court; but when the corporation has executed a mortgage, etc., or where there is a power of sale, etc., in any mortgage, then (unless with the written consent of the other parties in interest) the receivers shall be authorized to sell only the equity of redemption * * *. In such a case, instead of appealing from the order appointing the receivers, a mortgagee in such a case should appeal for permission to sell the property, and from the court's refusal of such right, an appeal will lie.

The Manufacturers & Merchants Co. v. Pyles. p. 322

4. The possession of the receivers is the possession of the court that appointed them. This appointment does not disturb or divest the lien of the mortgage.

The Manufacturers & Merchants Co. v. Pyles. p. 322

COURT OF APPEALS. See APPEALS.

CRIMINAL LAW. See BRIBERY. CONSPIRACY.**1. Consent.**

In the case of crimes, where an essential element is the want of consent of the individuals against whom they are committed, the instigation of the crime by the person to be affected is a defense to the prosecution. *Hummelshime v. State.* p. 570

2. Instigation by detectives.

But this principle does not apply to the case of the prosecution of public officers for an alleged conspiracy to demand a bribe for official action. *Hummelshime v. State.* p. 570

3. Province of jury.

In this State, the jury are the judges of both law and fact in criminal cases. *Hummelshime v. State.* p. 570

DAMAGES. See CONDEMNATION OF LAND. EJECTMENT, 2-4. LIQUIDATED DAMAGES.

It is the fundamental principle of the law of damages, that a person injured in his personal or property right shall be compensated therefor. *Ewing v. Rider.* p. 155

DEBTORS AND CREDITORS: PREFERENCES.

Apart from the provisions of the bankrupt or insolvent laws, a debtor has the right to prefer one creditor to another, when done *bona fide*, without fraudulent intent, and upon proper consideration. *Sunderland et al. v. Ebling.* p. 688

DECLARATION OF RIGHTS.

Art. 23—Law of the land. pp. 549, 633

Art. 35—No one to hold two offices at same time. p. 60

DECREES: REVIEW OF—**1. After enrollment.**

In general, a decree or decretal order after enrolment, can be revised or annulled only by a bill of review, or original bill, and not by a petition. *Whitlock Cordage Co. v. Hine.* p. 102

2. But when the case was not heard upon the merits, or where the circumstances are such as to satisfy the Court that the decree should be set aside, or where the decree was entered by mistake or surprise (or fraud) the question may be raised by petition.

Whitlock Cordage Co. v. Hine. p. 102

3. Certain receivership proceedings for winding up a partnership and paying the creditors lay in Court for nearly twenty years; some assets then becoming very valuable were sold, and

DECREES: REVIEW OF—*Continued.*

an audit was had, and an account stated and finally ratified, to one class of creditors, without notice to all parties in interest, it was *held*, that the question of whether the decree of ratification should be set aside, could be raised by petition.

Whitlock Cordage Co. v. Hine. pp. 107-108

4. —; delay.

In such a case, a delay of seven months after the final decree of ratification, is not such a delay as to bar relief.

Whitlock Cordage Co. v. Hine. pp. 109-110

5. Where a receivership case has lain in Court for nearly 20 years, creditors will not be presumed to have been continuously watching to see whether an audit was made, and a delay of six weeks after becoming aware of the audit, is not an unreasonable delay.

Whitlock Cordage Co. v. Hine. p. 110

DECREES: SETTING ASIDE.

After enrollment.

In general, after enrollment, a decree or decretal order, can be revised only by a bill of review or original bill, and not by petition, excepting where the case was not heard upon its merits, where the circumstances are such that the Court is satisfied that the decree ought to be set aside, or where the decree was entered by mistake or surprise.

Galloway v. Galloway. p. 516

DEEDS: EQUITABLE CONSTRUCTION OF—.

Loans in form of mortgage.

The mere fact that an instrument is in the form of a loan does not necessarily make it conclusive. Courts will inquire into the facts, and see what was intended, and not be governed simply by the form of an instrument, when, under the rules of evidence, that can properly be done. *Howard v. Hobbs.* p. 641

DEMURRERS. See PLEADING IN EQUITY.

DISTRIBUTION.

1. City and State as ultimate distributee; section 135 of Article 93 of Code; intestacy.

Section 135 of Article 93 of the Code, and the provisions of the Charter of Baltimore City, entitling the State of Maryland or City of Baltimore to the personal property of an individual who dies without leaving surviving any widow, husband, or re-

DISTRIBUTION—*Continued.*

lations within the fifth degree, etc., applies only to cases of intestates.

The George's Creek Coal and Iron Co. in Liquidation.

p. 604

2. These provisions do not apply to cases of stock in the name of an individual as "agent" or "trustee," when there is no evidence as to whether the interest of the principal, or the interest of the *cestui que trust*, has terminated or lapsed.

The George's Creek Coal and Iron Co. in Liquidation.

p. 604

3. —; school commissioners' rights of the county where letters granted.

The provisions in section 135 of Article 93 of the Code, for the reversion to the State of the funds or personal estate of parties dying intestate, without any relations within the degrees of kindred named therein, to be distributed to the Board of County School Commissioners of the county where letters of administration on the estate were granted, can have no application to the case of stock standing in the name of a trustee, domiciled in a foreign State, and where there was no evidence as to who were the *cestui que trustent*, nor in what county the letters should be granted.

The George's Creek Coal and Iron Co. in Liquidation.

p. 602

DIVIDENDS. See CORPORATIONS, 1, 2.

DIVORCE. See ALIMONY.

1. Abandonment; separation and intention.

Separation and intention to abandon must concur, in order to constitute cause for divorce on the ground of abandonment; but they need not be identical as to the time of their commencement.

Muller v. Muller. p. 76

2. Desertion.

Desertion, to constitute a ground for divorce, requires a simultaneous separation and intent to desert; although both elements must concur, they need not begin at the same time; but the desertion begins when to one element the other is added.

Muller v. Muller. p. 76

See also *Walker v. Walker.* p. 660

3. When a man ended all relations with his wife and left her, contributing nothing to her support, and announced to others

DIVORCE—*Continued.*

that he had gone to another city to join a woman, who he said was the "dearest thing on earth to him," and whom he hoped to marry, and where it does not appear that the wife concurred in the desertion, the facts of the case are such as to entitle the wife to a divorce *a mensa*. *Muller v. Muller.* p. 77

4. Both parties guilty.

Where each of the parties to a bill and cross-bill for divorce appears guilty of offenses that would be sufficient grounds for granting a divorce, the relief should be granted to neither.

Heckner v. Heckner. p. 696

5. Cruelty.

To justify a divorce on the grounds of cruelty, the causes must be grave and weighty, and such as show an absolute impossibility for the duties of the married life to be discharged.

Patterson v. Patterson. p. 695

6. But the law does not require that there shall be many acts.

Patterson v. Patterson. p. 695

7. Where violence has been inflicted and threats made, the court should not hesitate to interfere, where the facts, when considered with the attitude of the defendant, make it clear that the violence will be repeated. *Patterson v. Patterson.* p. 695

8. —; abusive words:

No abusive or reproachful words by a wife will justify the husband in assaulting and beating her.

Patterson v. Patterson. p. 695

9. Equity: setting marriages aside for duress, terror, etc.

The authority of courts of equity to set aside marriages on the ground that they were procured by abduction, terror, fraud or duress, rests upon their general jurisdiction to set aside contracts affected by fraud, etc.

Wimbrough v. Wimbrough. pp. 621-622

10. But the courts exercise the power with extreme caution, and only where the allegations of the bill are sustained by clear, distinct and satisfactory evidence.

Wimbrough v. Wimbrough. p. 622

11. Where ante-nuptial incontinence has taken place the charge of threat or menace unlawful, or fraud or duress, must be fully and satisfactorily established before a court of equity will annul the marriage.

Wimbrough v. Wimbrough. p. 622

DIVORCE—*Continued.*

12. The mere uncorroborated statements of the petitioner are not sufficient, especially when it is denied by all the defendant witnesses. *Wimbrough v. Wimbrough.* pp. 628-629

13. Foreign states; residence fraudulently acquired.

Where a party leaves the State of Maryland, where he was married and had his matrimonial domicile, with a view and sole purpose of obtaining in another State a divorce from his wife, without any intention of abandoning his domicile in Maryland, or of becoming a resident of the other State for any purpose other than for the divorce, but with a well-defined intention of returning to Maryland as soon as his object is attained, he does not acquire a *bona fide* domicile in the other State, and the courts of that State do not acquire jurisdiction to grant him a divorce; such a decree, so given, would be a glaring and deliberate fraud on such Court, and is not one which should be recognized in Maryland, either under the "full faith and credit clause" of the Constitution of the United States or under the principles of comity. *Walker v. Walker.* p. 665

14. Innocent parties alone can obtain—.

The maxim that "he who comes into equity must come with clean hands," is applicable in suits for divorce.

Green v. Green. p. 145

15. Divorce is a remedy provided for an innocent party, and any misconduct on the part of the complainant which constitutes a ground for divorce will bar his suit, without reference to the nature of the offense of which he complains.

Green v. Green. p. 143

16. If the proof discloses that both parties to the cause have grounds for a divorce, a decree should be granted to neither.

Green v. Green. p. 144

17. Setting aside—.

While influenced by threats of her husband, and under his control, a wife signed a letter, which had been read to her only in part, and which was a letter addressed to an attorney authorizing him to appear for her in divorce proceedings, to be instituted by the husband; it had not been disclosed to her what was to be the ground on which the divorce was to be sought for, nor had it been disclosed to her that the attorney's duties were restricted to the filing of an answer, or that he was not to appear for her at the taking of the testimony; the decree was

DIVORCE—Continued.

passed on March 10th, and the petition for its annulment filed on July 28th following; it was not shown that before the filing of the petition the status or position of the husband, as a result of the decree, had been in anywise changed; a demurrer to her petition to have the decree of divorce stricken out having been overruled, on appeal it was: *Held*, that upon all the facts of the case, although the decree had been enrolled, the overruling of the demurrer was correct. *Galloway v. Galloway*. p. 517

DOWER.**1. Relinquishment of—.**

But under sections 12 and 20 of Art. 45 of the Code of 1912, a married woman by contract with her husband may relinquish her right of dower, so that real estate then owned by him, or which he thereafter acquires, will be held by him free and discharged from any claim upon her part to dower therein; and a deed by him for such real estate is valid and sufficient to convey title, without the joinder of the wife. *Hill v. Boland*. p. 118

2. May not be alienated.

The dower right of a wife in the estate of her husband is not such a right as may be bargained or sold. *Hill v. Boland*. p. 115

DRIVING ACCIDENTS. See **NEGLIGENCE**, 7.

DURESS. See **DIVORCE**, 9.

EDUCATION. See **STATE BOARD OF—**.

EJECTMENT.**1. Landlord and tenant; possession alone; estoppel.**

A landlord who brings an ejectment against a tenant to recover possession of the demised premises and rents and profits, and recovers possession but fails to recover rents and profits, can not bring another suit and recover such rents and profits.

Gibbs v. Didier. p. 499

2. —; mesne profits, possession and damages.

In an ejectment suit between landlord and tenant, under the Code, section 73, Article 75, the landlord may recover possession, mesne profits and damages. *Gibbs v. Didier*. p. 497

3. —; service of copy of declaration.

In an ejectment between landlord and tenant, under the Code, section 73, Article 75, the service of a copy of the declaration

EJECTMENT—Continued.

ration is substituted for the niceties of demand of rent and entry, required at common law. *Gibbs v. Didier.* p. 494

4. —; **damages; ground rent, taxes, and public assessments.**

In an ejectment brought by a landlord against a tenant, under the Code, section 73 of Article 75, the landlord may recover possession of the property, the taxes, ground rent and sewerage assessment which fell due, from the time the tenant became assignee of the term, until the date of the filing of the declaration in the ejectment suit, after which time any rent falling due may be considered in fixing the amount of damages.

Gibbs v. Didier. p. 498

5. In such cases, if the landlord, by service of a declaration in ejectment, elects to determine the lease, he can not, though there has been no judgment in the ejectment suit, sue on covenants subsequently broken. *Gibbs v. Didier.* p. 494

6. The action of ejectment between landlord and tenant does not extinguish the landlord's right to rent and taxes due prior to the time of the filing of the declaration.

Gibbs v. Didier. p. 494

7. Form of declaration.

In an action of ejectment between landlord and tenant, under the Code, section 73, Article 75, the form of the declaration is that set out in section 71. *Gibbs v. Didier.* pp. 495, 496

8. Plea of not guilty: effect of—.

In an action of ejectment between landlord and tenant, under the Code, section 73, Article 75, under the plea of not guilty, the question to be tried is the right of possession and damages.

Gibbs v. Didier. p. 496

EMINENT DOMAIN.

1. Private property; just compensation.

Municipal authorities have no right to take or occupy any part of private property without due compensation therefor.

Mayor, etc., of Hagerstown v. Young. p. 484

2. —; public use; jurisdiction of courts to determine.

Courts have the authority to determine whether the use for which it is proposed to take private property, under the power of eminent domain, is public in its nature; but when that inquiry is answered in the affirmative, the question of the propriety of exercising that power is exclusively in the legislative discretion.

Cox v. Revelle. p. 588

EMINENT DOMAIN—*Continued.*

3. —; public use; although not for all the public generally.

For a use to be public, it is not necessary that in every case it should be open to the public generally; *semble*, it may be restricted to the citizens of the county where the possibility of exercising the use exists. *Cox v. Revelle.* p. 587

EMPLOYER AND EMPLOYEE.

1. Risk assumed.

In general, a servant assumes the risk of all open and obvious perils incident to the service he undertakes.

Hockaday v. Schloer. p. 682

2. —; children: warning to—.

But in the case of a servant of tender years, who is unable to appreciate or understand those perils from his own observation, it is the duty of the master to give him warning.

Hockaday v. Schloer. p. 682

3. A girl of 15, inexperienced in the use of machinery, had been employed as a sweeper in a factory; she was assigned the position of refilling with cotton the bobbins for a power sewing machine, and feeding them to the machine; she had not been warned that in feeding them to the machine she should do so from the side, and not by reaching across certain rollers, which were used to draw the fabric through the machine; upon reaching across the said rollers, her fingers and hand were caught and crushed: *Held*, that the case was one for the consideration of the jury, whether the defendants were not negligent in not having warned her of the danger. *Hockaday v. Schloer.* p. 684

4. —; machinery: defects in—.

In general, an employer is not liable for defects in machinery as to which he knew nothing and of which he had no chance to be informed.

Hockaday v. Schloer. p. 684

EQUITABLE PLEAS. See PLEADING.

EQUITY. See DECREES, ETC. INJUNCTION. PLEADING
IN EQUITY. PRACTICE IN EQUITY.

EVIDENCE. See STATE'S ATTORNEY.

1. Conversations.

Upon a criminal prosecution for carnally knowing a female under the age of 16, on cross-examination of the prosecuting witness, she was asked: First, "What did you tell the State's

EVIDENCE—Continued.

Attorney?" second, "Tell us your conversation with the State's Attorney?" Objections to the questions were sustained. *Held*, that by these questions she was expected to state all she told the State's Attorney, without regard to relevancy, and that the ruling was correct. *Riggins v. State.* p. 167

2. State's Attorney's admissions.

She was further asked whether the State's Attorney did not say to her father, that there was no ground to have arrested her or the accused; objection to the question having been sustained, it was *held*, on appeal, that the ruling was correct.

Riggins v. State. p. 167

3. Carnal knowledge; statements of prosecuting witness.

But a question as to whether she had not told the State's Attorney that she never had had intercourse with the accused, was proper, and should have been allowed to be asked and answered.

Riggins v. State. p. 168

4. Effect of—.

When evidence is once admitted, it is in the case to be considered, and the jury have the right to consider every fact that is proven to their satisfaction. *Smith v. Shuppner.* p. 419

5. Other occasions than one at issue.

Evidence that machinery had been out of order on other occasions is not admissible, in a suit for damages because of injury by the machinery, unless, in some way, the injury complained of is connected with such defects.

Hockaday v. Schloer. p. 684

6. Province of court and jury.

Whether there be any evidence or not is a question for the judge. Whether it is sufficient evidence is a question for the jury.

Heise & Bruns Co. v. Goldman. p. 559

7. Res gestæ.

Exclamations or expressions which are the spontaneous manifestations of distress, and which naturally accompany and furnish evidence of existing suffering, are the natural language of pain, and whenever its existence at any particular time is a relevant fact is always admissible as original evidence, under the rule of *res gestæ*.

Commissioners of Delmar v. Venable. p. 479

EVIDENCE—*Continued.*

8. They are in the nature of verbal facts, and may be testified to and described by anyone in whose presence they were uttered.

Commissioners of Delmar v. Venables. p. 479

9. *Res inter alios.*

Upon a question of whether the president of a corporation had personally and individually subscribed for certain shares of stock in another company, the ledger of the former company, showing the account of the vendor of the stock with that company, is *res inter alios acta*.

Boswell v. Norton. p. 14

10. Reversible errors: rulings of court on—.

For rulings of the trial court upon the admissibility of evidence to justify reversal on appeal, there must appear to have been error on the part of the court, and injury caused thereby to the appellant.

Boswell v. Norton. p. 14

11. Weight; province of jury.

Where there is *any* evidence legally sufficient to prove the issue, the weight and value of such evidence are for the jury to determine.

Taricab Co. v. Emanuel. p. 259

EVIDENCE: CONFLICT OF—.

Where there is a conflict of evidence, it is a question for the jury.

Hummelshime v. State. p. 571

EVIDENCE: SUFFICIENCY AND WEIGHT OF—.

See AGENCY, 2.

FEES: DELEGATION OF AUTHORITY TO FIX.

See CONSTITUTIONAL LAW.

FORESTRY: STATE BOARD OF—.

1. Trimming roadside trees; Chapter 824 of Acts of 1914.

Chapter 824 of the Acts of 1914, in requiring a permit from the State Board of Forestry for the trimming or removal of roadside trees on the public highways, does so as a regulation merely, and not as a possible prohibition of proprietary rights.

C. & P. Tel. Co. v. Board of Forestry. p. 672

2. —; respects vested ownership.

It was designed to prevent interference with trees on the public highways, by persons acting without interest; but vested ownership is to be respected, and the law is not to be construed

FORESTRY: STATE BOARD OF—*Continued.*

as meaning that a permit could be denied to one having a valid right of property in such trees.

C. & P. Tel. Co. v. Board of Forestry. p. 672

3. In the absence of any evidence or charge that the State Board of Forestry has established, or will establish, unreasonable rates or charges, in connection with the permits and inspection, in the matter of removing and trimming trees on the public highways, it is not to be presumed that the charges would be unreasonable. *C. & P. Tel. Co. v. Board of Forestry.* p. 675

FRAUD. See SPECIFIC PERFORMANCE, 6

GIFTS INTER VIVOS.

1. Actual transfer.

To make a gift *inter vivos* perfect and complete, there must be an actual transfer of all right and dominion over the thing given by the donor, and an acceptance by the donee, or some competent person for him; and it is essential to the validity of such gift that it should go into effect at once and completely; if it has reference to a future time when it is to operate as a transfer, it is but a promise without consideration, and can not be enforced either at law or in equity. *Howard v. Hobbs.* p. 640

2. Reservation of income to donor.

The mere fact that the donor reserves an income for life from the thing given, or requires the donee to pay, and secure the payment of, interest to him for life, on the sum given, is not sufficient to defeat it as a gift. *Howard v. Hobbs.* p. 641

3. Mortgages: gifts in form of—; separate agreement concerning satisfaction.

A donor had the donee execute, in the usual form, a mortgage of a piece of property, to secure the repayment, in five years from date, of the sum of \$1,000, which the mortgage recited had been loaned to the mortgagor by the mortgagee, with interest, etc. By a separate agreement between the parties to the mortgage, they declared that upon the death of the mortgagee the said mortgage should be deemed paid and satisfied, and that the representatives should execute a good and sufficient release therefor, without repayment of the principal and interest; provided the mortgagor paid the interest, etc.; the mortgage was not paid at the end of the five years, and the mortgagee instituted foreclosure proceedings; the mortgagors obtained a pre-

GIFTS INTER VIVOS—*Continued.*

liminary injunction to restrain the sale; before the sale, the mortgagee died; her administrators were made parties, and moved to dissolve the injunction; on appeal from an order of dissolution, it was: *Held*, that from all the evidence in the case, the transaction was really a gift for a good and valuable consideration, and the mortgagee being dead, the mortgage should be considered satisfied or extinguished.

Howard v. Hobbs. p. 648

HEIRS: ULTIMATE—. See DISTRIBUTION.

HIGHWAYS. See INJUNCTIONS, 3. ROADS. STREETS, ETC.

1. Owner of the soil: rights of—.

Subject to qualification under special conditions, the general rule is that in the case of ordinary highways the public acquires only an easement of passage and its incidents, and, subject to this servitude, the owner of the soil is entitled, except so far as required for highway purposes, to the earth, timber and grass growing thereon, and to all minerals, quarries and springs below the surface. *C. & P. Tel. Co. v. Board of Forestry.* p. 673

2. —; subject to rights of the public.

While the owner of the fee in a public highway has property rights in the natural products of the soil within the highway limits, his right to their use or disposition is subject to such restrictions as the nature of the servitude demands.

C. & P. Tel. Co. v. Board of Forestry. p. 673

3. —; subject to legislative regulation.

The right of the owner of the soil, subject to the use of a public highway, to fell or trim trees growing thereon, is capable of being exercised to the prejudice of the superior interest, and is a proper subject of legislative regulation.

C. & P. Tel. Co. v. Board of Forestry. p. 673

4. —; right to regulate trimming of trees; police power over.

Even though the need of regulating the removal or trimming of roadside trees should not be urgent, yet legislative action to that end is so related to the promotion of the public rights and interests in the highways as to bring the statute within the scope of the State's police power.

C. & P. Tel. Co. v. Board of Forestry. p. 674

HYATTSVILLE.**Sewerage system; Chapter 79 of Acts of 1908.**

The purpose of Chapter 79 of the Acts of 1908 was to give the Town of Hyattsville the power to extend the sewerage system, and did not confine it necessarily to merely adding to the length of the old sewer constructed in 1904.

Lyon v. Mayor, etc., of Hyattsville. p. 309

INFANTS.**In business; liability on contracts.**

Article 56, section 39 of the Code, requiring minors to take out a license before engaging in certain kinds of business, does not render a minor liable on his contracts, made in the prosecution of such business, in which he is engaged without a license.

Crew Levick Co. v. Hull. p. 9

INJUNCTION: APPEALS. See **APPEALS**, 3.

INJUNCTIONS.**1. Allegations in bill; general terms not sufficient.**

The mere allegation of a complainant, in a bill for an injunction, that irreparable damage or mischief will ensue, is not sufficient.

B. & O. R. R. Co. v. Gilmor. p. 617

2. —; facts must be stated.

To satisfy the conscience of the Court, the facts must be stated, to show that the apprehension of injury is well founded.

B. & O. R. R. Co. v. Gilmor. p. 617

3. Highways: obstruction of—.

The obstruction of a highway is a common nuisance, and being a wrong of a public nature, the remedy is by indictment, and not by injunction, at the suit of private individuals, unless they have suffered from it some special and particular damages, different, not merely in degree, but in kind, from that experienced by other citizens.

B. & O. R. R. Co. v. Gilmor. p. 617

4. The ground upon which equity interposes by injunction, to prevent the destruction of a street or highway, is the irreparable injury to the complainant.

B. & O. R. R. Co. v. Gilmor. p. 618

5. —; insufficient allegations.

An allegation that the complainants apprehend an injury to their business, and that they will be compelled to take a cir-

INJUNCTIONS—Continued.

cuitous route in driving to different parts of a town, is insufficient.

B. & O. R. R. Co. v. Gilmor. p. 618

6. Stay pending appeal; discretion of court.

From the action of a court, under section 29, Article 5 of the Code, in refusing to direct that an appeal from its order granting an injunction shall not stay the operation of the decree, no appeal will lie.

Crownfield v. Phillips. p. 3

ISSUE: DEATH WITHOUT LEAVING—**Presumption.**

There is no presumption in law that a party died without leaving issue.

The George's Creek Coal and Iron Co. in Liquidation.

p. 604

JOINT DEFENDANTS.**Judgments against; an entirety.**

A judgment against joint defendants is an entirety; and, on appeal, must be affirmed as to both, or reversed as to both; and if only one party is liable, the judgment can not be reversed as to him without a new trial, but must be remanded with a new trial for both.

Ewing v. Rider. p. 156

JUDGMENTS. See JOINT DEFENDANTS.**1. Motions to strike out; not as a mere act of form.**

When passing upon motions for striking out judgments which are made during the term, courts usually act liberally; but such judgments are not to be stricken out whenever such a motion is made during the term, nor as a mere act of form or caprice; but there must always be reasonable proof of circumstances which make it inequitable that the judgment should stand.

Malone v. Topfer. p. 163

2. —; another action instituted.

The fact that an action growing out of the same cause has been instituted by another party, is no ground for striking out a judgment, especially when it appears that such other action could not be maintained.

Malone v. Topfer. p. 164

JURY: PROVINCE OF—. See AGENCY, 1. CONDEMNATION OF LAND, 9. CONSPIRACY, 2. CRIMINAL LAW, 3. EVIDENCE, 6. EVIDENCE: CONFLICT OF—. MALICIOUS PROSECUTION, 2. PAROL CONTRACTS.

1. Contracts; partly oral and partly in writing.

Where a contract is partly in writing and partly in parol, it is a question for the jury, and not for the Court, to determine what was the contract between the parties.

Auburn Shale Brick Co. v. Cowan Bldg. Co. p. 226

2. Evidence: conflicts in—.

Where the evidence in a case is conflicting, it is for the determination of the jury, upon proper instructions.

Auburn Shale Brick Co. v. Cowan Bldg. Co. p. 228

3. Statement by juror.

A statement by a juror, made during a trial, that he could have attached to the machinery in question an attachment that would have prevented the injury complained of, should be excluded from the consideration of the jury, when there is no evidence that the injury arose because of the absence of such an attachment.

Hockaday v. Schloer. p. 685

JURY TRIAL: GUARANTEE OF—.

Constitution, section 6, Article 15; appeals.

In providing for an appeal to the Court of Appeals from the judgment of the Circuit Court, in determining whether, under Chapter 265 of the Acts of 1914, a particular area of natural oyster beds was excluded in the surveys made under the Act of 1906, the Act of 1914 declares that the Court of Appeals is empowered to review "all questions of law and fact involved": *Held*, that the presence of the word "fact" does not render the Act unconstitutional, as in violation of Article 15, section 6 of the Constitution, which guarantees the right of trial by jury; the word "fact" may be eliminated and the scope of the review confined to questions of law, without impairing the general effect of the law. *Shellfish Commissioners v. Mansfield.* p. 634

JURIES AND GRAND JURIES.

1. Irregularity in selection.

A traverser having been indicted for a violation of liquor laws, made a motion to quash the indictment, on the ground that the name of one of the grand jurors by whom the indict-

JURIES AND GRAND JURIES—*Continued.*

ment was found, was not on the list of names from which the jurors were to be selected, and that his name had been at any time placed in or drawn from the list from which such names were to be drawn; the State, in its answer, alleged that the juror drawn was the one intended to be drawn, but by a clerical error the name was accidentally misspelled; the traverser demurred: *Held*, that as the demurrer admitted the juror actually drawn was the one intended to be drawn, and as no injury had been shown or alleged, the error was immaterial.

Hollars v. State. pp. 369-370

2. —; question: how to raise—.

The motion to quash was a proper way to raise the question.

Hollars v. State. p. 368

3. Directory and mandatory provisions of law.

Section 1 of Article 51 of the Code, stating the qualifications for grand jurors, is directory merely; and to invalidate an indictment upon the non-age of a juror, it must be made to appear to the court that the traverser has been prejudiced by reason thereof.

Hollars v. State. p. 372

4. Unless irregularities, incident to carrying out in good faith, the provisions of the law made for the selection of juries, are shown materially to violate the statute, or so affect the juries as to prejudice the right of citizens, such irregularities should not be treated as vital.

Hollars v. State. p. 376

LACHES. See ADMINISTRATORS AND EXECUTORS, 2.

LANDLORD AND TENANT. See EJECTMENT. LEASES.

LEASES.

1. Improvements; money.

Besides the other terms and conditions for the payment of rent, a lease by the covenant upon which a right of action was based was as follows: "at the expiration of this lease to pay to the said party of the prst part the sum of seven hundred and fifty dollars in cash for the purpose of converting the room into a suitable storeroom."

Nydegger v. Gitt. p. 576

2. It was further agreed and understood, that if the parties of the second part (the lessees) became embarrassed or made an assignment for the benefit of creditors, or should be declared bankrupt, or should be sold out by sheriff's sale, then the rent

LEASES—*Continued.*

for the balance of the term, including the above sum of seven hundred and fifty dollars (\$750) cash, to be paid at the expiration thereof, to at once become due and payable, as if by the terms of the lease it had all been payable in advance, and should first be paid out of the proceeds of such assignment, bankruptcy or sale, any law, usage or custom to the contrary notwithstanding: *Held*, that the conversion of the premises at once into a suitable storeroom was not a condition precedent to the payment of the money. *Nydegger v. Gilt.* pp. 576-577

3. Assignment; rent subsequently falling due; rights of lessor: in equity alone.

A suit at law can not be maintained against the assignee of a lease who has assigned over, for rent falling due after the assignment to him and before the assignment by him; the remedy of the lessor in such a case being in equity alone.

Gibbs v. Didier. p. 492

4. Assignee's liability; taxes, etc.

The liability of an assignee of a term to the original lessor, or to those claiming under him, grows out of the privity of estate; and such liability continues only so long as such privity of estate exists. So long as such privity exists, the assignee is liable upon all covenants that run with the land, such as covenants to pay rent and taxes; and for any breach of such covenants the lessor may sue the assignee during the continuance of such assignment.

Gibbs v. Didier. p. 492

5. An action at law can not be maintained against an assignee of a term, after assignment over, for the breach of any covenant running with the land during his holding; the remedy, in such a case, is in equity.

Gibbs v. Didier. p. 492

LEGISLATURE: POWER OF— See CONSTITUTIONAL

LAW, 3, 4, 12. OYSTER LAWS, 7. TAXATION, 5.

Legislative offices.

Where an office is of legislative creation, the Legislature may modify, control or abolish it, and may change the manner of appointment. *Purnell v. State Board of Education.* p. 270

LETTERS: MAILING OF—

Evidence; mail chute.

Where it is a question of the mailing of a letter, testimony may be given as to whether the mail chute into which it had been placed was connected with a letter box on the lower floor.

Hummelshime v. State. p. 567

LIQUIDATED DAMAGES.

1. Where the parties, at or before the time of the execution of a contract, agree upon and name a sum therein to be considered as liquidated damages in lieu of anticipated damages which are, in their nature, uncertain and incapable of exact ascertainment, such sum will be regarded as *liquidated damages*, unless the sum so agreed upon is so grossly excessive and out of all proportion to the damages that might reasonably be anticipated.

Baltimore Bridge Co. v. United Railways. pp. 214-215

2. Intention of parties.

In such cases, the intention of the parties is one of the essential facts, and is to be sought from the contract itself, and from a consideration of all the facts and circumstances with which the parties were confronted at the time of the execution of the contract. *Baltimore Bridge Co. v. United Railways.* p. 215

3. Excessive damages.

If it should appear that the damages actually sustained were in fact less than the sum so stipulated, such sum is not, for that reason, to be characterized as a penalty, unless it be so exorbitant as to show that it was not a *bona fide* effort, made at or before the execution of the contract, to estimate the damages reasonably to be anticipated.

Baltimore Bridge Co. v. United Railways. p. 215

4. —; effect of on contract.

The effect of such a contract is to substitute the amount agreed upon as liquidated damages for the *actual* damages resulting from the breach; and the party who fails to perform such a contract will not be heard to say that the other party has not suffered any damages from the breach, or that his loss was less. *Cowan v. Meyer.* p. 465

5. —; not to be excessive.

Whether the amount is excessive or whether the damages are incapable of exact ascertainment, is to be determined from the subject-matter, considered in the light of all the surrounding circumstances connected therewith and known to the parties at the time of the execution of the contract.

Cowan v. Meyer. p. 463

6. But if the amount stipulated is found to be inadequate, the parties are still bound by the agreement, and no greater sum can be recovered.

Baltimore Bridge Co. v. United Railways. p. 215

LIQUIDATED DAMAGES—*Continued.*

7. A contract by a street railway company with a bridge company, for the rebuilding of a viaduct that carried the railway tracks over a stream, provided, among other things, for the payment of \$25.00 a day for each and every day's delay beyond the time stipulated for the completion of the work; the contract specifically declared that such payment "was to be as liquidated damages, and not as a penalty, as time was of the essence," and it was impossible at the time of entering upon the contract to estimate the substantial damages that delay would cause the railway company. *Held*, that, in considering the actual damages caused the company, the inconvenience and expense of operating its cars over the structure, and of protecting the passengers and employees, while the work was in progress, and further the loss of fares occasioned if timid people were deterred from using the cars, could all be taken into account, and that the liquidated damages claimed were not excessive.

Baltimore Bridge Co. v. United Railways. p. 219

8. A building and contracting company contracted to build a large terminal warehouse for a subsidiary company of the Western Maryland Railway. In the contract there was provided that there should be paid by the contractor, as liquidated damages, the sum of \$95.00 for every day's delay beyond the time limited for the completion of the work; a sub-contractor, knowing all the terms of the original contract, contracted with the building company for the digging of the foundations; there was in his contract the same provision for the payment of the same sum *per diem* as liquidated damages, for failure of the sub-contractor to complete the work within the specified time: *Held*, that in view of all the facts, the sum named was not excessive, and that the sum named should be treated as "liquidated damages" for the breach. *Cowan v. Meyer.* pp. 464-465

9. —; when enforceable.

Where the parties to a contract, at or before the time of the execution of the same, agree upon and name a sum therein to be paid as liquidated damages in lieu of anticipated damages which are in their nature uncertain and incapable of exact ascertainment, the amount so named will be regarded as liquidated damages and not as a penalty, unless such amount be grossly excessive and out of all proportion to the damages that might reasonably have been expected to result from such breach of the contract.

Cowan v. Meyer. p. 463

MARKET VALUE. See CONDEMNATION OF LAND, 13.

MALICIOUS PROSECUTION.

If a prosecution is instituted upon weak and unsubstantial grounds, for the purpose of annoyance, or of frightening and coercing the party prosecuted into a settlement of a demand, the surrender of goods, or the accomplishment of any other object than the vindication of public justice, the party who puts the criminal law in motion, under such circumstances, lays himself open to the charge of being actuated by malice.

Bishop v. Frantz. p. 196

2. Jury: province of—.

The jury should be instructed hypothetically as to what constitutes probable cause or want of it, leaving to them to find the facts embraced in the hypothesis.

Bishop v. Frantz. p. 191

3. Malice.

The term "malice" in this connection does not mean spite or hatred, but merely "*malus animus*," or improper and indirect motives.

Bishop v. Frantz. p. 196

4. In such cases the plaintiff must prove that the prosecution was both malicious and without probable cause, to entitle a recovery; but the existence of malice, is a question of fact for the jury, under all the facts of the case.

Bishop v. Frantz. p. 190

5. Probable cause.

As used in relation to the question of malicious prosecution, the phrase "probable cause" means such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the party accused to be guilty.

Bishop v. Frantz. p. 190

MARRIAGE.

Refusal to live together.

The statement of a man, that, although he will marry a woman, he will never live with her, is not sufficient to render the marriage ceremony void. *Wimbrough v. Wimbrough.* p. 629

MARRIAGE AND LEGITIMACY.

Presumption and burden of proof.

When a marriage has been consummated in accordance with the forms of law, it is presumed that there were no legal impediments to such marriage; and the fact, if shown, that either or

MARRIAGE AND LEGITIMACY—Continued.

both of the parties have been previously married, and that the other party to such previous marriage was still living at the time of the second marriage, the presumption is that the former marriage had been legally dissolved; and the burden of proving that the former marriage had not been dissolved rests upon the party seeking to impeach the second marriage.

Schaffer v. Richardson. pp. 93-94

MARRIED WOMEN. See **TAXATION**, 7.

MAXIMS.

He who comes into equity, must come with clean hands.

Green v. Green. p. 145

MAYOR OF BALTIMORE CITY.**Qualifications for office.**

Chapter 512 of the Acts of 1914, repealing section 16 of the City Charter (Acts of 1898, Chapter 123), and amending the law as to the length of time of residence in the City of Baltimore necessary to render eligible a candidate for the office of Mayor for that city, and omitting the requirement of his having been assessed with property and of having paid taxes thereon for two years preceding the date of the election at which he is a candidate, does not have the effect of repealing Chapter 15 of the Acts of 1900 (which it does not mention), or of repealing any of the former statutes declaring that no member of the Board of Police Commissioners of Baltimore City shall be eligible to an election or appointment to the office of Mayor during the term for which he was appointed to such board.

Wachter v. McEvoy. pp. 405-406

MECHANICS' LIENS.**1. Notice of intention to claim.**

Unless notice of an intention to claim a mechanics' lien is given within the time prescribed by section 11 of Article 63 of the Code, no lien can be maintained.

Frederick Co. Natl. Bank v. Dunn. p. 395

2. Separate contracts.

Where there are two separate and distinct contracts for labor or materials, although they have relation to the same building, they can not for the purposes of the lien be coupled together, so as to extend the date for the filing of the lien down to the time the last material was furnished or the last labor performed, under the later contract.

Frederick Co. Natl. Bank v. Dunn. pp. 395-396

MECHANICS' LIENS—*Continued.*

3. Time for notice.

But as to each contract, the time for the giving of a notice, or the filing of a lien, is dependent for its being in season as to the particular contract under which the work is done; and conversely where there is a single entire contract, the time is to be computed from the last material delivered or work done, in connection with the contract, even though that be small in amount, or far removed in point of time from the balance of the work.

Frederick Co. Natl. Bank v. Dunn. p. 396

4. —; estoppel of owner.

For making alterations to a bank there was only one single contract; the supervising architect, by the contract, was made the judge of any dispute about the interpretation of the contract; a sub-contractor thought he had completed the work under the contract, but the architect ruled that some work under the contract was unfinished; the contractor and sub-contractor, by agreement among themselves, did the work; the sub-contractor filed his notice of his intention to claim his lien for the work; if the work had been completed as the sub-contractor claimed, the time to claim a lien had expired; but, as the architect—the agent of the owner—had ruled that the contract had not been completed, it was *held*, that the owner was estopped, and that the lien should be allowed, as it had been filed within the statutory time of doing the work.

Frederick Co. Natl. Bank v. Dunn. p. 397

MESNE PROFITS. See LANDLORD AND TENANT.

MINORS. See EMPLOYER AND EMPLOYEE. PARENT AND CHILD.

Releases by females over 18; Code, Article 79, sections 7 and 8.

Under sections 7 and 8 of Article 79 of the Code, authorizing any female over eighteen years of age to execute a release to any trustees for the proceeds of a sale, and section 10, providing that such release should be a valid discharge, the fact that one female petitioner, out of many, was less than eighteen years old when the petition was filed for the distribution of the trust estate, does not require that there should be a continuation of the trust estate until she should arrive at the full age of 21 years, when she would reach the age of 18 years shortly after the entry of the decree.

Thorne v. Thorne. p. 127

MISREPRESENTATIONS. See **SPECIFIC PERFORMANCE**, 7.

MISTAKE. See **CONTRACTS**, 3.

MORTGAGES. See **DEEDS: EQUITABLE CONSTRUCTION OF—**. **GIFTS INTER VIVOS**, 3.

1. Mortgagee's liability; after default.

The mortgagee is regarded as assignee of the term, after default, in a mortgage which contains a condition allowing the mortgagor to remain in possession until default, and as such is liable for the future breach of any of the covenants in the lease that runs with the land, and this without the mortgagee taking possession.

Gibbs v. Didier. pp. 492-493

2. The mortgagee of a term, after forfeiture, has the whole estate therein, and is liable on the real covenants in the lease, whether he becomes possessed of or occupies the premises in fact or not.

Gibbs v. Didier. p. 492

3. The mortgagee of a term is not liable under the covenants running with the land for taxes that fall due before a default in the mortgage, when the mortgage contains a condition allowing the mortgagor to remain in possession until default.

Gibbs v. Didier. p. 493

4. Satisfaction; reversion to mortgagor.

When a mortgage is satisfied, without default, it becomes inoperative and void, and the legal estate reverts to and becomes vested in the mortgagor, without any reconveyance or release.

Howard v. Hobbs. p. 645

MOTIVES. See **CONSPIRACY**.

MULTIFARIOUSNESS.

A bill in equity is bad for multifariousness when it embraces different persons as complainants or defendants, who have no privity with each other, or where the same person is complainant in different capacities, or where the defendant is made defendant in regard to several distinct matters having no connection with each other.

Fried v. Burk. p. 509

MULTIPLICITY OF SUITS.

Concurrent remedies.

The law is adverse to multiplying suits; and if a party has the choice between two actions upon the same demand, and he selects one, which is decided by a competent tribunal, either for or against him, as a general rule he will not be permitted to resort to the other.

Gibbs v. Didier. p. 499

MUNICIPALITIES. See **BALTIMORE CITY. WATER RIGHTS.**

1. Streets: liability for—.

A municipality can not be made liable for injuries received owing to the condition of its streets, unless it be shown that it had actual or constructive notice of their bad condition.

Commissioners of Delmar v. Venables. p. 476

2. —; negligence.

After a street has been out of repair, so that the fact has become notorious to those traveling the street, and there has been full opportunity for the municipality, through its agent charged with that duty, to learn of that condition, and to make the repairs, the law imputes notice to it, and charges it with negligence if it fails in such duty, to the damage of some one injured thereby. *Commissioners of Delmar v. Venables.* p. 476

3. Where a municipality, in constructing a street, had left a stump in the bed of the street, which as the earth had been worn away by passing vehicles, was left projecting some six or seven inches above the surface, and where by the exercise of reasonable care and diligence, its officers could have learned of the dangerous condition and have corrected the same, and so have prevented an injury complained of, there was evidence of negligence on the municipality's part legally sufficient to go to the jury. *Commissioners of Delmar v. Venables.* pp. 476-477

4. It is the duty of a municipality to exercise active vigilance over the streets, to see that they are kept in a reasonably safe condition for travel.

Commissioners of Delmar v. Venables. p. 476

5. In the exercise of such active vigilance, in keeping the streets in a reasonably safe condition for public travel, the officers of a municipality are expected to inspect the streets from time to time, and to do the repair work found necessary.

Commissioners of Delmar v. Venables. p. 476

6. Nuisances: liability for—.

Where a municipal corporation is empowered by its charter to prevent and remove nuisances, to pave and keep the streets in repair, and to levy taxes therefor, the exercise of such power is not merely discretionary, but is *imperative*; and in such cases, it is the duty of the municipality not only to pass the necessary ordinances, but to be vigilant and prompt in their enforcement.

Annapolis v. Stallings. p. 345

MUNICIPALITIES—*Continued.***7. Negligence of city.**

Where a municipality is negligent in enforcing such an ordinance, it can not rely upon the ordinance as a defense.

Annapolis v. Stallings. p. 349

8. But before a municipality can be made liable for injuries arising from the bad condition of its streets, it must be shown that it had actual or constructive notice of such bad condition.

Annapolis v. Stallings. p. 346

9. —; notice.

If the defect is of such a character as not to be readily observable, express notice to the municipality must be shown.

Annapolis v. Stallings. p. 347

10. But if it be one which the proper officers had notice of, or by the exercise of reasonable care and diligence might have had knowledge of, in time to have it remedied, so as to prevent the injury complained of, then the liability of the municipality attaches.

Annapolis v. Stallings. p. 347

NEGLIGENCE. See MACHINERY.

1. Automobiles; excessive speed.

In an action for damages for injuries alleged to have been received by the plaintiff, by being hit by the defendant's automobile, evidence that the automobile was going at an excessive speed, is evidence legally sufficient to submit to the jury in determining the question of negligence.

Taxicab Co. v. Emanuel. p. 259

2. Burden of proof.

To entitle a plaintiff to recover in a suit for damages because of injuries received through the alleged negligence of the defendant, there must be some act of negligence, either of commission or omission, on the part of the defendant or its servant, and evidence that such negligence was the cause of such injury, and the burden of proof is on the plaintiff.

Taxicab Co. v. Emanuel. p. 256

3. Contributory—; as a matter of law.

To justify a court in saying that conduct is *per se* contributory negligence, it must present such features of negligence as to leave no opportunity for difference of opinion in the minds of ordinarily prudent men as to its imprudence.

Commissioners of Delmar v. Venables. p. 478

NEGLIGENCE—*Continued.*

4. To establish contributory negligence, as a matter of law, the act relied on must be distinct, prominent and decisive, and one about which ordinary minds would not differ.

Taxicab Co. v. Emanuel. p. 259

5. —; when question for jury.

Where the nature and attributes of the act relied on to show contributory negligence can only be correctly determined by considering all the attending circumstances, it is for the jury, and not for the Court to pass upon and characterize it.

Taxicab Co. v. Emanuel. pp. 259-260

6. —; possibility of avoiding accident.

It does not follow that because a plaintiff, in a suit for damages for injuries received from an automobile, could have avoided the accident, that he is guilty of contributory negligence; in such a case, to make him guilty of contributory negligence, it must be shown that he knew of the car's approach in time, or by the use of reasonable diligence *should* have known it in time, to have avoided the accident.

Taxicab Co. v. Emanuel. p. 262

7. Driving accidents.

The fact that the person injured by the overturning of his wagon because of its being driven over a small stump of a tree that had been left projecting from the bed of the street, was riding on the top of a load of fodder, where he could not see all of the surface of the street, is not as a matter of law contributory negligence.

Commissioners of Delmar v. Venables. p. 478

8. Trespassers; railway freight cars.

Where, without the invitation, express or implied, a person, by his voluntary, independent act, without the knowledge or permission of the railway company, enters upon a freight car standing on a siding, he is to be regarded as a trespasser.

Ward v. B. & O. R. R. Co. p. 287

9. Where, for the purpose of allowing a freight car to be unloaded by the consignee, a railway company leaves it standing upon a siding in front of a freight shed, and a person, without the invitation of the railway, either express or implied, and without its permission or knowledge, enters the car, and while in the act of leaving it is injured by other freight cars, which

NEGLIGENCE—Continued.

were shunted against the car, such person is not entitled to recover damages resulting from the accident, unless he can show that the railway's servants had knowledge of his peril in time to avoid the injury, and that they then failed to exert proper care to avoid the injury.

Ward v. B. & O. R. R. Co. p. 288

10. Subsequent injuries, received in hospital.

In an action for damages for injuries received, if there is evidence that additional injuries were occasioned afterwards by the treatment the plaintiff received in the hospital to which he went, and that the plaintiff might have avoided such additional injuries by the use of ordinary care, he is not entitled to recover for such additional injuries.

Taxicab Co. v. Emanuel. p. 262

NEGOTIABLE INSTRUMENTS.**Endorsements declared null; jurisdiction of equity.**

To warrant a court of equity in declaring the complainant's endorsements on certain notes null and void, because of the fraudulent conduct and misrepresentations of an agent of the payee, the evidence to sustain the bill must be clear and convincing. *Newbold v. Lafayette Mill and Lumber Co.* p. 697

NON-RESIDENTS. See SUMMONS: SERVICE OF—.**NOTICE.****1. "Due notice."**

"Due notice" means, in the manner prescribed by law.

Basford v. Cranford. p. 21

2. Constructive—.

By "constructive notice" is meant such notice as the law imputes in the circumstances of the case.

Commissioners of Delmar v. Venables. p. 476

NUISANCES. See MUNICIPALITIES.**OFFICERS: PUBLIC. (As to SALARIES AND FEES OF—, see CONSTITUTIONAL LAW, 3-5.)****1. Suits against—; costs.**

In suits against a State official, where the rights involved are of a purely private character, and for the benefit of the appellants, the costs should not be taxed against the official, even though the order appealed from be reversed.

Fidelity Savings Bank, etc., v. Vandiver. p. 356

OFFICERS, ETC.—*Continued.*

2. Salaries of; constitutional restriction to \$3,000.00; only to fee officers.

Section 1 of Article 15 of the Constitution, limiting the amount of compensation public officers may receive, does not prohibit the General Assembly from creating salaried officers with pay in excess of \$3,000. *Thrift v. Laird.* p. 63

3. This section applies only to that class of officers whose pay or compensation is derived from fees which they are entitled by law to receive for the performance of their official duties.

Thrift v. Laird. p. 63

OFFICERS OF THE STATE: SALARIES PAID BY BALTIMORE CITY. See CONSTITUTIONAL LAW, 3.

OFFICES OF TRUST AND PROFIT. See CONSTITUTIONAL LAW, 5.

ORDINANCES OF MAYOR AND CITY COUNCIL.

No. 10—(Approved March 9th, 1841): Opening streets in Baltimore. p. 43

No. 26—(Approved April 3rd, 1866): Opening streets: mode. p. 44

No. 387—(Approved August 16, 1909): B. & O. R. R. Co. grade crossing in South Balto. p. 80

No. 320—(Approved July 16th, 1913): B. & O. R. R. grade crossing in South Baltimore. p. 80

No. 371—(Approved December 15, 1913): Appropriation for expenses for 1914. p. 58

ORPHANS' COURTS.

1. Powers of—; over administrators, appraisers, etc.

Under section 235 of Article 93 of the Code, the Orphans' Courts have full power to direct the conduct and accounting of executors and administrators, superintend the distribution of estates, and administer justice in all matters relating to the affairs of deceased persons. *Wingert v. State.* p. 541

2. Real estate: no power to try title to—.

The Orphans' Courts are without jurisdiction to try and determine questions of title to real estate.

Wingert v. State. p. 543

OSTEOPATHY.**1. Regulation of—; Chapter 786 of Acts of 1914.**

Chapter 786 of the Acts of 1914 prohibits the practice of osteopathy by any except graduates of institutes having a corporate character and affording designated courses of study; and requires that all practitioners of osteopathy should be registered by the clerk of the circuit court of the county or city where their practice is being conducted.

Cutty v. Carson. pp. 28-30

2. The requirement of registration applies to those who were in practice before the Act was passed, as well as to those who qualify *after* the law became effective. *Cutty v. Carson.* p. 31

3. Those who, before the statute, were not practitioners of osteopathy are required to be examined by the State Board, and to obtain the board's license, before they are entitled to registration as such practitioners. *Cutty v. Carson.* p. 30

4. But, under the Act, one who, before its passage, was a graduate of an incorporated college of osteopathy, and a practitioner of that school, in order to be entitled to register, need not procure a license from the State Board.

Cutty v. Carson. pp. 31, 32

5. The law requires that an applicant for registration (who has been a practitioner before the passage of the Act) should make affidavit that he had been granted a diploma by a reputable incorporated college, etc.; such a practitioner was refused the right to register, on the ground that he had no license from the State Board; in a petition against the clerk to compel him duly to register, etc., the petition averred that the petitioner was such a graduate, etc., and that he offered to make the affidavit required by the Act, and tendered the proper fee, but was denied the opportunity: *Held*, that the allegations were sufficient to call for an answer as to the facts, and that a demurrer to the petition was not sustainable. *Cutty v. Carson.* p. 35

6. The averments in the petition were not open to the objection of being mere conclusions of law. *Cutty v. Carson.* pp. 35, 36

OPINIONS. See STATE'S ATTORNEY, 1, 2.

OYSTER LAWS.**1. Leasing for private use.**

The intent and policy of Chapter 711 of the Acts of 1906 was that natural oyster beds or bars should not be subject to

OYSTER LAWS—Continued.

lease for private use, but should be reserved as public oyster fisheries for use in common by the people of the State, under suitable regulations and license. *Cox v. Revelle.* p. 587

2. —; condemnation of leases.

Leasehold interests acquired from the State are as completely subject to condemnation for public use as titles derived from any other source. *Cox v. Revelle.* p. 584

3. Police power.

Police regulations with respect to such estates do not cause any impairment within the meaning of the Federal Constitution. *Cox v. Revelle.* p. 584

4. Act of 1914.

Chapter 265 of the Acts of 1914 amended Chapter 711 of the Acts of 1906, by providing a method by which, upon petition alleging that five or more acres of natural oyster beds or bars had been excluded from the surveys of natural beds, filed in the Circuit Court nearest the area in question, the same should be heard in the said court, before a jury (unless a jury trial was waived by all the parties), with the right to appeal to the Court of Appeals; the Act provided for the condemnation of any natural grounds or beds that might so be found wrongfully excluded; the law specially safeguarded the rights and interests of lessees under leases from the State, in existence at the time the Act of 1914 went into effect, and provided against the divesting of those rights until compensation could be awarded therefor in the condemnation proceedings: *Held*, that in view of the provisions of the Act protecting the outstanding rights of the lessees, the Act was not in violation of section 40 of Article 3 of the Constitution, prohibiting the taking of private property for public use without just compensation.

Cox v. Revelle. p. 586

5. Natural beds; evidence; Chapter 265 of Acts of 1914.

In proceedings, under the Act of 1914, to determine whether a certain area was improperly omitted in the survey made by the Shell Fish Commission for classification as natural oyster beds, as defined by that Act, evidence is admissible to show that, for more than five years prior thereto, the area in question had been under lease to private parties, for culture and stocking of oysters; such evidence is proper to rebut the presumption that

OYSTER LAWS—Continued.

oysters found there within five years indicated that the area was a natural bar. *Shellfish Commissioners v. Mansfield*. p. 635
6. —; location of—; Chapter 265 of Acts of 1914.

Substantial accuracy in the location of natural oyster bars, according to the provisions made by Chapter 265 of the Acts of 1914, is feasible, and the method prescribed for the location of the natural beds presents no ground for declaring the Act unconstitutional.

Shellfish Commissioners v. Mansfield. pp. 632-633

7. Policy of laws; for Legislature.

With the policy of legislation regarding the disposition of the oyster grounds the courts have no concern; the sole authority to deal with that subject is vested in the Legislature.

Cox v. Revelle. p. 586

8. Public use.

The taking of oysters by the public, under license of the State, from lands and waters subject to its ownership and control, is undeniably a public use. *Cox v. Revelle*. p. 587

9. But for such use to be public, it is not necessary that every natural oyster bar should be open to the public generally; the right may be validly restricted to the citizens of the county within whose territory the fishery is located.

Cox v. Revelle. p. 587

PARENT AND CHILD.**1. Services of child.**

Services rendered by children to their parents, while residing with them, without any agreement for compensation, do not constitute a valuable consideration for a conveyance by a parent to a child, and such conveyances are void as against judgment creditors. *Sunderland v. Ebling*. p. 690

2. Destruction of parent's right.

A parent may destroy the rights of the relation of master and servant by abandonment, neglect or cruelty; but in what manner and by what acts this can be done, must depend upon the special circumstances of each case. *Malone v. Topfer*. p. 161

PAROL CONTRACTS.**Province of jury.**

In the case of an oral contract, it is the province of the jury to decide as to the existence of these necessary ingredients of a

PAROL CONTRACTS—*Continued.*

special warranty, by considering all the circumstances attending the transaction; provided evidence adduced to show the facts was legally sufficient to be submitted to the jury.

Greer v. Whalen. p. 279

PAROL EVIDENCE. See CONTRACTS, 13.

PARTITION OF REAL ESTATE.

1. Commissioners; failure to be sworn when appointed.

The fact that commissioners, appointed by a court of equity to make partition of and divide real estate, failed to be sworn, as required by law and by their commission, does not vitiate their return, when it appears that no determination, decision or conclusion was reached by them, and no part of the duties imposed upon them was in fact completed, until each of the commissioners had taken the required oath.

Basford v. Cranford. p. 18

2. —; effect of return; mere irregularities.

The returns of commissioners, appointed under Article 46 of the Code, to make partition of real estate, are not to be set aside for unsubstantial and merely formal irregularities.

Basford v. Cranford. pp. 23-24

3. To justify a court in setting aside a partition of real estate on the ground of a mistaken judgment on the part of the commissioners, the mistake must be a serious one, and the evidence of it too plain to be in doubt.

Basford v. Cranford. p. 24

PARTNERS.

1. Competition in same business.

Unless with the consent of the other partners, one partner can not carry on a business of the same nature and in competition with that of the firm.

Crownfield v. Phillips. p. 3

2. Injunctions.

A violation of this rule may be enjoined.

Crownfield v. Phillips. p. 5

3. Duties of surviving partners; quasi trustees.

The relations of surviving partners and the personal representatives of a deceased partner are those of *quasi* trustees and *cestui que trustent*.

Fried v. Burk. p. 507

4. —; accounting.

The surviving partners of a firm can not deprive the executor or administrator of a deceased partner of the right to a full and accurate accounting.

Fried v. Burk. p. 506

PARTNERS—*Continued.*

5. A bill filed against the surviving partners for an accounting by the executors of a deceased partner prayed that the defendants might be required to answer under oath, etc., that the complainant might have the books examined, etc., that the defendants might be required to account to the complainant for the interest of the deceased partner in the partnership property to the time of his death; that the money collected on a certain policy of life insurance that had been made payable to the firm, and had been collected by them, might be declared partnership assets, and that a certain agreement between the defendants as to the division of the assets, be declared void, and for general relief: *Held*, that the bill was not multifarious. *Fried v. Burk.* p. 510

PEDESTRIANS. See STREETS AND SIDEWALKS.

PLEADING.

Equitable pleas.

The statute allowing equitable pleas does not enlarge the jurisdiction of courts of law, so as to confer upon them the power of cancelling or reforming contracts.

Nydegger v. Gitt. p. 578

PLEADING IN EQUITY. See MULTIFARIOUSNESS.

1. Allegation of bill; must be full, accurate and clear.

Every material fact, which it is necessary for a complainant to prove to establish his right to the relief he asks, must be alleged in the bill with reasonable accuracy and clearness.

Boyd v. Shirk. p. 179

2. —; general charges sufficient.

A general charge of the matters of fact, however, is usually all that is required, and it is not necessary to state minutely all the circumstances which go to prove the general charge.

Boyd v. Shirk. p. 179

3. —; fraud; charge in general terms not sufficient.

But where the complainant seeks relief on the ground of fraud, he must do more than make the general charge; he must state the facts which constitute the fraud. *Boyd v. Shirk.* p. 179

4. Demurrers.

A demurrer does not admit conclusions of law drawn by a plaintiff from facts stated in the bill. *Boyd v. Shirk.* p. 181

PLEADING IN EQUITY—*Continued.*

5. —; general—; when overruled.

A general demurrer to a whole bill can not be sustained if the relief prayed in any part of the bill is proper.

Mayor, etc., of Hagerstown v. Young. p. 484

6. Submission on bill and answer.

Where a case is submitted on bill and answer, the answer must be taken as true, in so far as it is responsive to the bill.

Lyon v. Mayor, etc., of Hyattsville. p. 308

POLICE COMMISSIONERS OF BALTIMORE CITY.

Term of office; resignation.

The term of office for which a member of the Board of Police Commissioners is appointed is not ended by his resignation therefrom; and the fact that a member of such board resigns before the expiration of the time for which he was appointed does not render him eligible for the office of Mayor of Baltimore City.

Wachter v. McEvoy. pp. 407-408

POLICE POWER.

1. The police power of a State embraces regulations designed to promote the public convenience, or general prosperity, as well as regulations to promote the public health, morals or safety.

C. & P. Tel. Co. v. Board of Forestry. pp. 673-674

2. Importance or gravity not for the courts.

In deciding whether particular classes of acts are proper subjects of regulation under the police power, it is not the duty of courts to determine the extent or gravity of the necessity for its exercise.

C. & P. Tel. Co. v. Board of Forestry. p. 674

3. The essential inquiry is whether the conditions to which the power is proposed to be applied may reasonably be regarded as a possible source of injury to the public interest that is sought to be protected.

C. & P. Tel. Co. v. Board of Forestry. p. 674

4. Regulations not to be unreasonable.

While the State may have the right to apply the police power to a specific purpose, yet the regulations prescribed for the enforcement of the power must not be arbitrary and unreasonable.

C. & P. Tel. Co. v. Board of Forestry. pp. 674-675

PRACTICE. See EJECTMENT. JOINT DEFENDANTS.

PRAYERS. REMOVALS. SUMMONS.

PRACTICE ACT OF BALTIMORE CITY.

1. Purpose.

The Speedy Judgment Act, for Baltimore City, Chapter 184 of the Acts of 1886, was to obtain from both plaintiff and defendant a definite and sworn statement of both the claim and the defense (if any), so that the parties may know exactly wherein they differed and shape their action accordingly

McDonald v. King. p. 593

2. Proceedings: statutory and special.

The proceeding under the statute is special and statutory, and it is only when the provisions of the Act are strictly complied with that the court has authority under it to enter judgment by default.

McDonald v. King. p. 593

3. Account; must show liability of defendant.

To obtain the benefit of the statute, the account which must be filed with the declaration must be one which either on its face shows the liability of the defendant and the amount of such liability, or one which itself furnishes the standard or means of arriving at such liability.

McDonald v. King. p. 594

4. Unless the account filed with the declaration conforms to these requirements, the court has no jurisdiction to enter a judgment by default.

McDonald v. King. p. 594

5. A contractor having failed to install the kind of heating plant such as he had agreed to install, the plaintiff notified him that unless he made the necessary changes, to make it conform to the contract, that he, the plaintiff, would have the changes made at the cost of the contractor; the contractor failing or refusing, the plaintiff employed a mechanic to do the work; the plaintiff brought suit against the first contractor, under the Speedy Judgment Act; the account filed with the declaration was the bill of the mechanic against the plaintiff, and the liability of the defendant nowhere appeared thereon: *Held*, that such an account was not such a one as to bring the suit under the provisions of the Act.

McDonald v. King. p. 594

6. Judgment for what is admitted to be due; defendant not estopped by admissions.

Under the Baltimore Practice Act, if the plaintiff fails to take a judgment for the amount that the defendant admits to be due, the defendant is not bound or estopped by his admission in the affidavit to the pleas.

Sisters of Notre Dame v. Kusnitt. p. 341

PRACTICE IN COURT OF APPEALS. See APPEALS, 1, 2.

PRACTICE IN EQUITY. See DECREES: REVIEW OF—.
DECREES: SETTING ASIDE—. INJUNCTIONS, 1-2, 6.
PARTITION OF REAL ESTATE.

PRAYERS.

1. Borrowed from other cases.

The fact that an instruction was taken from the language used in an opinion of the Court of Appeals in a former case, does not necessarily make the instruction correct in another case.

Smith v. Shuppner. p. 415

2. Correction of one—, by another.

While sometimes the misleading effect of one prayer may be held to have been corrected by a prayer of the opposite party, such a rule is not to be applied in the case of a serious error.

Howard v. Street. p. 302

3. —; directing verdicts.

A prayer to instruct the jury to find a verdict for the defendant, upon the ground that there is no evidence in the case legally to show that he had failed in any of the duties which he owed the plaintiff, as alleged in the declaration, amounts to a demurrer to the evidence.

Hockaday v. Schloer. p. 679

4. In passing upon such a prayer, the Court must assume the truth of all the plaintiff's testimony, regardless of any contradiction in the evidence offered by the defendant.

Hockaday v. Schloer. p. 679

5. —; too general.

A prayer for the Court to "instruct the jury that, under the pleadings and evidence in the case, the plaintiff can not recover, and their verdict must be for the defendant," is too general, and indefinite, and submits no proposition of law, and should be refused.

Auburn Shale Brick Co. v. Cowan Bldg. Co. p. 225

6. Declarations: sufficiency of—.

Where the declaration was in proper form and its counts sufficient to allow a recovery, if the plaintiff could sustain his theory of the case, such a prayer can not be considered an attack on the legal sufficiency of the declaration.

Auburn Shale Brick Co. v. Cowan Bldg. Co. p. 225

PRAYERS—*Continued.*

7. Reversal without new trial.

But, in such cases, if upon the whole proof there should appear to be no evidence legally sufficient to enable the plaintiff to recover, the case may be reversed, without granting a new trial. *Auburn Shale Brick Co. v. Cowan Bldg. Co.* p. 227

8. Allegata and probata.

Where there is no exception to the admissibility of evidence, and no prayer raising the question of a variance between the pleadings and the evidence, a prayer of this character is too general to raise the question of variance between the *allegata* and *probata*. *Auburn Shale Brick Co. v. Cowan Bldg. Co.* p. 225

9. Issues: jury to be confined to—.

A defendant has the right to have the jury confined to the issues as made by the pleading. *Hockaday v. Schloer.* p. 679

10. Separate paragraphs.

While the arrangement of a prayer in separate paragraphs, instead of in the usual form, is not one that is approved, yet it is not always of sufficient moment to warrant a reversal.

Wagner v. Klein. p. 236

11. Taking case from jury; waiver.

The offering of testimony, by a defendant, to prove the issue, after the Court has refused his prayer to instruct the jury that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, is a waiver of his right to have the ruling reviewed upon appeal.

Commissioners of Delmar v. Venables. p. 475

12. A prayer, seeking to take a case from the jury for the want of legally sufficient evidence, should not be granted, if there is any evidence, however slight, that is competent, pertinent, and coming from a legal source, and tending to prove the plaintiff's case.

Taxicab Co. v. Emanuel. p. 259

PREFERENCES. See DEBTORS AND CREDITORS.

PRESUMPTIONS. See ISSUE: DEATH WITHOUT—. TESTAMENTARY CAPACITY, 7, 8.

PRINCIPAL AND AGENT: CREATION OF RELATION OF—. See AGENCY, 4.

PRIVATE PROPERTY AND PUBLIC USE. See CONSTITUTIONAL LAW, 2-9. EMINENT DOMAIN.

PUBLIC SERVICE COMMISSION: SALARIES. See CONSTITUTIONAL LAW, 5. OFFICERS OF THE STATE, ETC.

PUBLIC USE: WHAT IS. See OYSTER LAW, 8, 9.

RAILWAYS. See NEGLIGENCE, 8.

REAL ESTATE BROKERS. See AGENCY.

RECEIVERS. See CORPORATIONS, 3-4.

1. Guaranteed debts; priorities.

Receivership proceedings were instituted to wind up a partnership and pay off the creditors; one of the partners made also a deed of trust of all his individual property for the benefit of his creditors; the trustee in this deed of trust was the same individual as the receiver; the partner subsequently guaranteed the indebtedness of the receiver to one of the receiver's creditors, and later filed in the trust estate case his authority and direction to the trustee, after settling the expenses and debts due by himself in the trust estate, to transfer the balance to the receiver for the purposes of such receivership. *Held*, that the guarantee of one creditor's debt had no priority, but all the surplus individual assets were applicable to the payment of the receiver's unpaid creditors without preference.

Whitlock Cordage Co. v. Hine. p. 111

2. Mortgagee's rights.

The possession of the receivers is the possession of the court that appointed them. This appointment does not disturb or divest the lien of the mortgage.

Merchants and Manufacturers Co. v. Pyles. p. 322

RECORD IN COURT OF APPEALS. See APPEALS, 5.

REMAINDERMEN AND LIFE ESTATES.

The will of C. H., after making other disposition of the property, provided as follows:

(a) In regard to the one undivided third part of the residuum " * * * I give and bequeath the net annual income thereof to my granddaughter, E. L. P., for her sole and separate use, for the term of her natural life," etc.

(b) "And after the decease of my said granddaughter, if she should leave a child or children then living, or the descendants then living of any child or children who may have died before her, then the income of said one-third part, as it shall

REMAINDERMEN AND LIFE ESTATES—Continued.

become due, to be applied to the support, maintenance and education of such child, children or descendant *per stirpes* for the term of 21 years after the death of the said granddaughter, or until the youngest child of the granddaughter living at the time of the testator's death should reach maturity, and the principal of said third to be then distributed amongst them *per stirpes*."

(c) But if the said granddaughter did not so leave descendants living at the time of the testator's death, or should all of her said descendants so living die within 21 years of her death, then the principal of such one-third part to go to the testator's sister, E. L. H., if then living; if not, then to go to such persons as she may by will appoint, or to her residuary legatees if she had failed to appoint.

The life tenant died, leaving two sons and no descendants of any deceased child; both of her sons attained the age of 21 years (before the end of 21 years after the life tenant's death): *Held*, that the two sons of the life tenant were entitled to the distribution of the said third of the estate, and that the (c) clause did not apply. *Hughes v. Pennington.* p. 134

REMOVALS. See CONDEMNATION OF LAND.**1. Time for motion.**

After the jury has been sworn it is too late to exercise the right of removal. *Taxicab Co. v. Emanuel.* p. 265

2. Joint parties; civil cases.

The term "party," as used in the Constitution, Article 4, section 8, and in the Act of 1868, Chapter 180, regarding the right of removal in civil cases, must be taken collectively, where there are more persons than one, as plaintiffs or defendants, and such application must be made in behalf of all the persons constituting the party plaintiffs or party defendants; the right does not reside in each of the plaintiffs or defendants.

Taxicab Co. v. Emanuel. p. 265

RES ADJUDICATA.**1. New proceedings under retroactive statutes.**

Under the provisions of Chapter 711 of the Acts of 1906, certain areas had been leased to private parties for the purpose of oyster farming; the validity of the lease had been attacked by proceedings at law, but the attack was unsuccessful in the

RES ADJUDICATA—*Continued.*

lower court, and on appeal the lower court was sustained; Chapter 265 of the Acts of 1914 provided new definitions of what were natural bars, and provided new proceedings for the legal determination of the questions: *Held*, that in proceedings under the latter Act, former judicial findings under the Act of 1906, regarding the same area, could not be pleaded as *res adjudicata*. *Cox v. Revelle*. p. 588

2. Trial by court without a jury.

The decision of a court upon a claim in a former action is an effectual bar to a recovery in another suit upon the same cause of action as that of a jury, and the fact that the Court's decision was wrong does not give the injured party the right to bring another suit upon the same claim, for he might have appealed and had the error corrected. *Gibbs v. Didier*. p. 499

RES GESTAE. See EVIDENCE, 7.

REVOCATION. See AGENCY, 5.

ROADS. See HIGHWAYS. STATE ROADS COMMISSION.
STREETS, ETC.

SALES OF LAND IN EQUITY.**1. Lands of unborn remaindermen; section 228 of Article 16 of Code.**

A court of equity has no authority or jurisdiction to decree a sale and conveyance of land, to which unborn remaindermen have title, excepting the authority and jurisdiction contained in section 228 of Art. 16 of the Code. *Denson v. Denson*. p. 363

2. —; no reservation and investment for life tenant.

Under that section, there is no authority in a court of equity, by a decree, to reserve a portion of the proceeds from the prescribed reinvestment, in order that such portion may be distributed at once to a life tenant. *Denson v. Denson*. pp. 363-364

3. Tenant's good-will in business.

But where the life tenant was conducting a profitable business of her own upon the property, and a separate sum was paid to her, for her business and good-will, the proceeds of the sale of such business formed no part of the fund for the benefit of the remaindermen, and to it only the life tenant was entitled.

Denson v. Denson. p. 366

SALES OF LAND IN EQUITY—*Continued.*

4. But out of the proceeds of the sale of the property itself the life tenant was not entitled to have any *additional* sum awarded to her specially for her business interests, apart from her interest as life tenant. *Denson v. Denson.* p. 366

SAVINGS BANKS.

1. Deposits with State Treasurer: under Chapter 109 of Acts of 1892, are in trust for depositors; right of Legislature to terminate.

Chapter 109 of the Acts of 1892, requiring certain savings banks to deposit bonds with the Treasurer of the State, the same to be registered in his name, had the effect of constituting the Treasurer as a trustee for a certain specific purpose; but as the trust was created by Act of Assembly, it was analogous to a trust created by an individual with a reserved right of terminating the trust.

Fidelity Savings Bank, etc., v. Vandiver. p. 355

2. The depositors in such banks were not, and technically could not become, *cestuis que trustent*, with regard to such bonds, unless, or until, by the failure of such banks there was a necessity of having recourse to the bonds.

Fidelity Savings Bank, etc., v. Vandiver. p. 355

3. —; depositors' rights.

But under the provisions of that Act, the depositors had a distinct interest in the preservation of the fund, of which they could not be deprived, by any subsequent Act, which by its terms is prospective only.

Fidelity Savings Bank, etc., v. Vandiver. p. 356

4. The Act of 1914, Chap. 781, directing the State Treasurer to forthwith surrender to each of the savings bank the bonds so deposited by each, respectively, and declaring that the Act is to be construed retrospectively as well as prospectively, violates no vested rights, contravenes no section of the Constitution, and is valid.

Fidelity Savings Bank, etc., v. Vandiver. p. 356

SCHOOLS. See STATE BOARD OF EDUCATION.

SEDUCTION: ACTION FOR—.

1. Damages; who has right to sue.

During the minority of a child, anyone standing *in loco parentis*, in whose service she is, may maintain an action for dam-

SEDUCTION: ACTION FOR—*Continued.*

ages for the loss of services through her seduction by the defendant. *Malone v. Topfer.* p. 160

2. A father had abandoned his family, and been divorced from his wife; he contributed practically nothing to the daughter's support, and neither received nor claimed any service from her; the daughter lived with and helped the mother: *Held*, that in such a case, the mother could maintain an action for her seduction. *Malone v. Topfer.* p. 162

SEWERS. See **HYATTSVILLE.**

SPECIFIC PERFORMANCE.**1. Conditions for—.**

If at the time of the execution a contract was then certain, mutual, fair in all its parts, and for an adequate consideration, it is immaterial that by force of subsequent circumstances it should have become less beneficial to one party, unless such change is in some way the fault of the party seeking its specific performance. *Lucas v. Long.* p. 428

2. Contracts relating to real estate.

Where a contract relating to real estate is in writing, and its nature and circumstances unobjectionable, it is as much a matter of course for a court of equity to decree its specific performance as it would be for a court of law to give damages for its breach. *Lucas v. Long.* p. 427

3. Bad bargains.

The rights of parties to a contract must be determined by the terms of the agreement they have voluntarily made. Courts can not make a different contract for them, or relieve them of the consequences of a bad bargain. *Cowan v. Meyer.* pp. 466-467

4. Fairness.

In such a case, the fairness or hardship of a contract, like its other qualities also, must be judged as of the time it was entered into. *Lucas v. Long.* p. 428

5. —; as of time contract entered into.

If the contract was reasonable and fair when entered into, it will be presumed the risk of subsequent fluctuations in value was assumed by the parties, and such fluctuations will not be allowed to prevent specific performance of the contract.

Lucas v. Long. p. 428

SPECIFIC PERFORMANCE—*Continued.***6. Fraud; when a bar.**

The fraud must work an actual injury to the party resisting the enforcement of the contract, and it must appear, not only that he did rely upon the false statement, but that he had the right to rely upon it, in the full belief of its truth.

Lucas v. Long. p. 429

7. Misrepresentation.

Misrepresentations as to the purpose for which it is proposed to purchase a piece of property, in order to be a ground for refusing to decree a specific performance of the contract, must not only be false, but they must have been material to the contract or transaction which is to be avoided, and must have worked actual injury to the defendant, or must have been the moving cause for entering into the contract of sale.

Lucas v. Long. p. 429

8. —; must be material.

A statement that a tract of land was being purchased for a dairy farm, when the tract was not cleared and was totally unfit for dairy farming, and where the owner knew and claimed that it was specially valuable for sub-division and development, can not be regarded as a material misrepresentation, sufficient to form the basis for a refusal to decree the specific performance of a contract of sale, where the purchase was really intended for such last mentioned purpose.

Lucas v. Long. p. 429

9. Title of vendor.

Where a bill for specific performance is brought, for the purpose of testing the title of a vendee, in order for a decree to be granted, it is not required that the title shall be absolutely perfect and free from every possible doubt; a threat, or even the possibility, of a contest will not be sufficient to defeat the right to the decree; but to have such effect, the doubt must be considerable and rational, such as would and ought to produce real, *bona fide* hesitation in the mind of the court.

Bullock v. Staylor. p. 699

10. —; adverse possession.

The mere fact that the vendor's title to land depends upon adverse possession, is no defense to a bill for specific performance.

Bullock v. Staylor. p. 699

SPECIFIC PERFORMANCE—*Continued.*

11. Purchaser's duty: limits of—.

But a purchaser is not bound to make the party he buys from as wise as himself; and every man must bear the loss of a bad bargain legally and honestly made. *Lucas v. Long.* p. 430

STATE'S ATTORNEY.

1. Privilege.

While statements made privately to the State's Attorney by a prosecuting witness are privileged, in the sense that he can not be examined thereon, so as to contradict her, yet sometimes such a witness may be examined as to what the statements were.

Riggins v. State. pp. 172-173

2. Opinions of—.

It is improper for a prosecuting officer to assert his personal belief or personal conviction as to the guilt of the accused, if that belief or conviction is predicated upon anything other than the evidence in the case. *Riggins v. State.* p. 174

3. But if such opinion is based upon testimony which, while not in the Record, was yet in evidence in the trial below, it presents no ground for reversal. *Riggins v. State.* p. 174

STATE BOARD OF EDUCATION.

Appointment of—.

By Chapter 584 of the Acts of 1904, the Legislature must be presumed to have intended to authorize the Governor to await, if he sees fit, until after the adjournment of the Legislature, before he makes his appointment to the State Board of Education. *Purnell v. State Board of Education.* p. 271

STATE ROADS COMMISSION.

1. Appropriation of funds.

The courts have the right to prevent the State Roads Commission from diverting funds appropriated by the Legislature for the building and improvement of one road, or set of roads, to the construction of another or others.

Magruder v. State Roads Commission. p. 532

2. Courts' jurisdiction over—.

But to justify a Court in interfering with the powers and the large discretion vested in the commission, it should be very clearly shown that it was improperly using the funds.

Magruder v. State Roads Commission. p. 533

STATE ROADS COMMISSION—*Continued.***3. Discretion of commission.**

In appropriating the funds among the different roads in districts of a county, for every difference of opinion their judgment should not be reviewed by the courts.

Magruder v. State Roads Commission. pp. 534-535

4. Condemnation of land.

The Acts of 1912 (Chapter 177) and 1914 (Chapter 463), repealing and amending the Condemnation Laws of the State, especially exempt from their operation the law relating to the opening, closing or widening of highways.

Koehler v. State Roads Commission. p. 448

STATE OFFICERS. See OFFICERS: PUBLIC.

STATUTES: CONSTRUCTION OF—

1. Valid in part and void in part.

Courts are not justified in declaring a whole Act unconstitutional, merely because one of its provisions may be open to that objection, unless the valid and void portions are so dependent upon each other as to raise the presumption that the law would not have been passed if the invalid portion had been omitted.

Shellfish Commissioners v. Mansfield. p. 634

2. Every part to have effect.

A statute should, if possible, be so construed as to give effect to every part of it.

Purnell v. State Board of Education. p. 271

3. Intent of legislation; duty of courts.

The policy of legislation is not to be determined by the courts, whose duty simply is to see that the legislative intent is carried out.

Purnell v. State Board of Education. p. 272

4. In construing statutes, the intention of the Legislature is always to be sought.

Purnell v. State Board of Education. p. 270

5. Ordinary import of words.

In general, the words employed are to be considered, and they are to be interpreted according to their plain, ordinary and natural import; if they are clear, precise and unambiguous, the Legislature must be understood to mean what it has plainly expressed.

Purnell v. State Board of Education. p. 270

STATUTES: CONSTRUCTION OF—*Continued.*

6. The real intent of a statute, when ascertained, will always prevail over the literal sense of its language.

Cutty v. Carson. p. 33

7. **Courts: functions of—.**

It is the function of courts to interpret legislation, and not to supply its omissions.

Wachter v. McEvoy. p. 407

8. **Repeal of—.**

An Act of the Legislature is always subject to repeal by a succeeding Legislature.

Fidelity Savings Bank, etc., v. Vandiver. p. 355

9. **Repeal by implication; not favored.**

If two Acts can be fairly construed together, the later Act can not be held to repeal the former Act by implication.

Koehler v. State Roads Commissioners. p. 449

Wachter v. McEvoy. p. 406

10. It is only when they are clearly irreconcilable and not susceptible of any such fair interpretation as will admit of their standing together that such repeal will be declared.

Wachter v. McEvoy. p. 406

11. **Restrictions in one section; when applied to whole Act.**

Where a statute, in one section, expressly limits the scope of its application, the whole statute should be so construed, although other sections contain language that would ordinarily be of a wider scope.

Cutty v. Carson. p. 33

12. **Retroactive.**

Statutes, in general, are not given effect retrospectively, unless it appears either by express language or necessary implication, that such was the legislative intent.

Fidelity Savings Bank, etc., v. Vandiver. p. 355

13. **Statutes to be upheld if possible.**

Courts will not declare void an Act of the Legislature, if by any reasonable construction it can possibly be maintained.

Weber v. Probey. p. 551

14. **Wisdom of—; not for courts to decide.**

The courts will not declare an Act unconstitutional, because it is unwise or inexpedient, nor will they strike it down, because it will operate harshly upon persons affected by it. These are matters committed to the judgment of the law-making power. They are purely political, and are not reviewable by the courts.

Weber v. Probey. p. 551

STATUTES: CONSTRUCTION OF—*Continued.*

15. Every presumption favors the validity of a statute; it can not be stricken down as void, unless it plainly contravenes some provision of the Constitution; a reasonable doubt in its favor is enough to sustain it. *Thrift v. Laird.* p. 70

16. The party assailing a statute must point out the special provision of the Constitution to which it is obnoxious.

Thrift v. Laird. p. 70

17. With the wisdom or unwisdom of legislatures, the courts have nothing to do; the duty of courts is to carry out and give effect to legislative enactments, whenever the said enactments do not transcend the Legislature's constitutional power.

Fidelity Savings Bank, etc., v. Vandiver. pp. 355-356

STATUTE OF FRAUDS.

Guaranty; debt of another; when original undertaking.

A contract to answer for the debt of another is not within the provisions of the Statute of Frauds, if the real purpose of the defendant was to subserve some purpose of his own.

Auburn Shale Brick Co. v. Cowan Bldg. Co. p. 227

STATUTES: TITLES OF—. See CONSTITUTIONAL LAW, 15.

1. Constitution, section 29 of Article 3.

The purpose of section 29 of Article 3 of the Constitution, relating to the titles of statutes, is "to prevent 'logrolling' legislation; to give the people general notice of the character of the proposed legislation, so they may not be misled; to give all interested an opportunity to appear before committees of the Legislature and to be heard upon the advisability of the proposed legislation; to advise members of the character of the proposed legislation, and to give each an opportunity to intelligently watch the course of the proposed bill; to guard against fraud in legislation, and against false and deceptive titles."

Weber v. Probey. p. 551

2. Details of Act not necessary.

Under this section, although the title of a statute need not give the provisions of the statute in detail, nor even an abstract of them, it must not be misleading. *Weber v. Probey.* p. 552

3. Section 29 of Article 3 of Constitution.

While that section is mandatory, it is to be liberally construed.

Thrift v. Laird. p. 70

STATUTES: TITLES OF—*Continued.*

4. While under it the title must indicate the subject, it need not give an abstract of the Act, nor need it mention the means and methods by which the general purpose is to be accomplished. *Thrift v. Laird.* p. 70

5. Mt. Rainier; Chapter 250 of Acts of 1914.

Chapter 250 of the Acts of 1914, by its title authorizes the Mayor and Council of Mt. Rainier to levy taxes on the assessable property of the town, to redeem the bonds authorized for the construction of the sewer system, etc., provided for; while section 7 of the Act authorizes the assessment of the same upon abutting property owners, and the title of the Act being at variance with the provisions of the Act itself, is misleading, and the Act is unconstitutional and void.

Weber v. Probey. pp. 552-553

6. And this provision of the Act is so connected with the purpose and scheme of the Act, that it is not to be presumed that the Legislature would have passed the Act without it, and the whole Act is void. *Weber v. Probey.* p. 553

STOCK AND STOCKHOLDERS.

1. In name of "agent" or "trustee."

Where a certificate of stock is issued to an individual as "agent," and it so appears on the stub in the corporation stock book, it indicates that the stock is not his property personally, and his personal representative is not entitled to have the stock transferred to him.

The George's Creek Coal and Iron Co. in Liquidation.

p. 599

2. Where stock is issued in the name of an individual as "trustee," upon the death of the stockholder, the burden of proof is upon anyone claiming through or for him, to prove what, if any, is his legal or equitable interest in the stock.

The George's Creek Coal and Iron Co. in Liquidation.

p. 599

STREETS AND HIGHWAYS: CHANGE OF GRADE OF—. See CONSTITUTIONAL LAW, 6, 8.

STREETS AND SIDEWALKS. See HIGHWAYS.

1. Pedestrians' rights and duties.

The streets and sidewalks of a city are for the benefit of all conditions of people, and all have a right, in using them, to

STREETS AND SIDEWALKS—Continued.

assume that they are in an ordinarily good condition, and to regulate their conduct upon that assumption.

Annapolis v. Stallings. p. 351

2. A person using a sidewalk, where there are no obvious obstructions, is required to use only ordinary care.

Annapolis v. Stallings. p. 351

SUMMONS: SERVICE OF—

Non-residents; service on solicitor.

Quære: Whether a non-resident can come into a Court of this State, employ a solicitor to represent him in recovering a claim from an estate under the control of the Court, and then, if some proceeding is instituted in reference to the claim in accordance with the established practice of the Court, take the position that service can not be had on the solicitor of record who represented that claim.

Whitlock Cordage Co. v. Hine. p. 109

TAXES.

Executors' liability; after settlement of estate.

Under the statutes in force in Maryland, the liability of administrators and executors for the payment of taxes upon the property of their decedent, does not extend to the payment of taxes becoming due after the settlement and distribution of the estate, although the annual valuation and assessment of such property, as well as the levy thereon, may have been made prior to such settlement and distribution of the estate.

Bamberger v. Baltimore City. p. 443

TAXATION.

1. —; **illegal; injunction.**

Taxpayers of an incorporated town or city have the right to proceed in equity to enjoin the municipal authorities from making a contract or incurring obligations which they have no lawful power to make or incur, and which, if made or incurred, will increase the burden of taxation. *Weber v. Probey.* p. 550

2. **Collateral inheritance tax; appraisers: appointment by Orphans' Court.**

Under sections 124, 129 and 135 of Article 81 of the Code (1912), providing that in all cases where real estate of any kind is subject to the (collateral inheritance) tax, the Orphans' Court of the county in which administration is granted shall

TAXATION—*Continued.*

appoint the same persons to appraise and value the real estate who may have been appointed to value the personal estate, such Orphans' Court has the power and jurisdiction to entertain and determine the question of an additional and amended inventory and appraisal of the real estate of the decedent, and to receive and hear evidence in relation to it.

Wingert v. State. p. 540

3. But until appraisers duly appointed under said section 124 are removed by the Court, it has no authority to appoint others in their places.

Wingert v. State. p. 542

4. Removal of appraisers.

It is within the power of an Orphans' Court, upon charges of incompetency, neglect of duty, or unfaithful conduct, injurious to the estate, sustained by proof, upon hearing, to remove the administrator or appraisers, and appoint others in their places.

Wingert v. State. p. 542

5. Legislature's power over municipal corporations; for public improvements; abutting property owner.

The Legislature has the power of taxing particular districts for local benefits or improvements; and to authorize municipal corporations to open, pave, grade, curb, etc., any street or part of street, and to assess the cost of such work upon the property binding upon such street or part thereof. And in the absence of any declaration of intent to the contrary, the presumption is that the Legislature considered that the purpose of such taxation or assessment was a public purpose, and that the improvement would inure to the special benefit and advantage of the owner of the adjacent property, upon which the assessment was laid.

Lyon v. Mayor, etc., of Hyattsville. p. 311

6. Front-foot rule.

Acts of the Legislature, authorizing the assessment for such benefits according to what is called the "front foot" rule are within the constitutional right of the Legislature, even though no provision is made for any preliminary hearing as to benefits; such assessment does not constitute a "taking of property without due process of law."

Lyon v. Mayor, etc., of Hyattsville. pp. 311-313

7. Notice; married women; property in husband's name.

Where real property belonging to a married woman was for years assessed upon the tax books in the name of her husband,

TAXATION—*Continued.*

and the taxes paid by him, and where a notice of improvements, for **which** the abutting property was to be assessed, was sent to him, and he attended all the meetings in reference thereto, and was advised of the amount that was to be charged to the property that was assessed in his name, and where he, being an engineer, offered to prepare and draw plans for the improvement, it cannot be contended that the wife, the owner of the property, had no notice of the contemplated improvement.

Lyon v. Mayor, etc., of Hyattsville. p. 316

TAX SALES.

1. Anne Arundel County.

Section 229 of Article 2 of the Code of Public Local Laws, relating to tax sales in Anne Arundel County, requires that *notice* be served upon the owner of the property, if this can be done under the prescribed conditions.

In re Swann's Estate. p. 522

2. Substantial compliance with law.

In proceedings for the sale of property to enforce the collection of taxes, the jurisdiction of the Court to which the sale is reported is special and limited, and can be exercised only when there has been a substantial compliance with the provisions of the law.

In re Swann's Estate. p. 523

3. While the order of ratification gives presumptive validity to a tax sale, yet if it appears from the record or proof that there has been a failure in any material feature in any respect to observe the requirements of the statute, the attempted transfer of title, by the sale, must be held inoperative and void.

In re Swann's Estate. p. 524

4. Notice.

This right of the owner to be notified does not depend upon his occupancy of the land, and if he is not in possession, notice must be delivered to him elsewhere in the district, if he is a resident of that locality.

In re Swann's Estate. p. 523

5. It is only when the owner can not be given personal notice, within the district, that the alternative method of notification can be resorted to.

In re Swann's Estate. p. 523

6. The law authorizes no discrimination, as to notice, in the case of plural ownership, and all who are charged with the taxes and own the land are entitled to a personal notice, before

TAX SALES—Continued.

their rights can be affected by such a sale, provided they are within the reach of the service that the Act prescribes.

In re Swann's Estate. p. 523

7. —; tenants in common.

As ownership, and not occupancy, is the basis of the provisions for the successive notices, the mere fact that one tenant in common is in possession does not deprive the other owners, resident in the same locality, of their right to be warned of the approaching sale of their property.

In re Swann's Estate. p. 523

TENANTS IN COMMON.**—; not agents.**

The legal relationship between tenants in common does not imply agency on the part of a tenant in possession for the other co-tenant, with respect to notice of outstanding claims affecting the title.

In re Swann's Estate. p. 523

TESTAMENTARY CAPACITY.**1. Evidence.**

In the evidence of a caveator, testimony had been adduced tending to show that the testatrix had said that it was not very pleasant for her at the home of her daughter, because "all that she heard was money"; in rebuttal, the caveatees offered to show that money, investments, rates of interest, etc., and business conditions, were the favorite topics with the testatrix, and since she was not able to read she depended entirely upon what was told her. *Held*, that under the circumstances, the evidence was relevant and admissible.

Wagner v. Klein. p. 234

2. Testimony of the testatrix's son-in-law, who had lived with her for 26 years, is admissible to show that he thought her a very staunch business woman.

Wagner v. Klein. p. 235

3. Opinions: physicians'—.

A physician who, for a number of years, regularly attended a testatrix, is competent to state his opinion as to the testatrix's mental capacity, but he must state the facts and circumstances upon which the opinion is based.

Wagner v. Klein. p. 233

4. —; non-experts; foundation.

In questions of mental capacity, a foundation must be laid for an opinion, and non-experts can not be permitted to give it,

TESTAMENTARY CAPACITY *Continued.*

without giving the facts and circumstances upon which the opinion was based. *Smith v. Shuppner.* p. 417

5. In proceedings to determine a testator's testamentary capacity, it is the duty of the court, before permitting a witness, other than an attesting witness, or an attending physician testifying as an expert, to express an opinion as to the mental capacity of the testator, to require a statement of the facts and circumstances upon which such opinion was based.

Smith v. Shuppner. p. 417

6. Prayers.

A prayer is correct that does no more than direct the jury's attention to the fact that what they are to determine is the condition of the testator's mind at the time of the execution of the will, and that if they are satisfied from the evidence that he was then capable of making a valid will, the fact that they may believe him to have become incompetent at a later period should have no effect. *Smith v. Shuppner.* p. 419

7. Presumptions.

The presumption of law is that a testator was of sound mind at the time of the execution of his will, and the burden of proof is upon the caveator to prove the contrary.

Smith v. Shuppner. p. 417

8. A person defending a will is entitled to rely upon the presumption that a testator's reasons for excluding near relatives were valid and sane reasons. *Smith v. Shuppner.* p. 417

9. Provisions of will; cutting off near relatives.

The fact that a testator disposes of his estate to the exclusion of near and dear relatives, without any known or apparent cause, while constituting a suspicious circumstance as to his capacity to make a proper disposition, does not *per se* furnish sufficient ground to set aside the will.

Smith v. Shuppner. p. 416

10. Will itself: provisions of—.

The intrinsic evidence furnished by the will itself is always an element to be considered by a jury in determining the sanity of a testator. *Smith v. Shuppner.* p. 416

TITLE TO REAL ESTATE.**Life tenant; with power of alienation.**

If by a grant D. has an estate in lands for life, with power to sell the same, and after his death, should he not have sold the lands, the same to be divided equally among the grantee's children, D. has the power to convey a good and marketable title to the property. *Welsh v. Davis.* p. 39

TREASURER: STATE—. See **SAVINGS BANKS, 1.**

TRESPASSERS. See **NEGLIGENCE.**

TRESPASS Q. C. F.**1. Growing crops; damages.**

Recovery in an action for injuries to crops by trespass is limited to injuries occurring during the three years before the commencement of the suit, provided the defense of limitations is specially pleaded. *Ewing v. Rider.* p. 152

2. —; evidence.

In an action for damages to growing crops, the measure of damages is the value of the crop at the time of its destruction; but in determining this amount, the evidence of the probable yield and value of the crop, had it reached maturity, and proof of the value of the part of the crop that was not destroyed, is admissible. *Ewing v. Rider.* p. 155

TRUSTS: TERMINATION OF—.**Unforeseen circumstances; right of courts to order distribution.**

A will devised all the residue of the estate to trustees, in trust, to be held by them to collect the income and apply the same to the payment of all expenses and indebtedness due thereon, with power to sell and reinvest, etc., the property to be so held in trust until it should be worth \$20,000; then to be sold and divided and distributed in ten equal shares; the expenses were greater than the income, and part of the property was sold to reduce the indebtedness, and the remainder was worth less than \$17,000. *Held*, that in view of such conditions, not provided for by the testator, and in the absence of any indication in the will that the property, after payment of the debts, should be held for a possible enhancement in value, that might increase it to \$20,000, a court of equity should comply with the unanimous request of the parties entitled, that distribution be made without delay. *Thorne v. Thorne.* p. 126

TRUSTEES. See SAVINGS BANKS, 1.

TRUSTS AND TRUSTEES.

Right to give restrictive deeds.

By an item of his will, a testator conferred upon the trustees, during the life of the *cestui que trust*, the following powers, to wit: In their discretion from time to time to change the investment of the trust estate and to reinvest the same in other good securities, including ground rents, and a part of it they might invest in real estate if more desirable, and in case of any sale by the said trustees, the purchasers not to be bound to look to the application of the purchase money. The trustees conveyed a certain tract of real estate comprising a part of the corpus of the trust estate to the Title Guarantee & Trust Company, and in the deed imposed restrictions upon the use and development of the property in keeping with the high-class improvements in the neighborhood; the Title Company sold and conveyed certain of the lots to R. H. Pleasants and others, and reconveyed the balance of the tract to the trustees, all the conveyances having the same character of restrictions; as a result of the restrictions the lots sold for a much higher price; the purchaser of one of the lots objected to the consummation of the sale, on the ground that, while the trustees had the right to impose restrictions on the lots actually sold by them, they had no right to impose any restrictions on the balance of the real estate retained by them; upon an appeal from an order of a court of equity, decreeing specific performance, it was *held*, that the trustees had full power to sell the real estate held by them, in trust, and to reinvest it in other real estate "if more desirable," and they could therefore sell and reinvest in *restricted* real estate.

Pleasants v. Wilson. pp. 244-245

WARRANTIES.

1. Breach; return of goods.

Upon a breach of warranty, the buyer may return the chattel, if delivered, within a reasonable time after discovering the breach, and recover, in the common counts, the amount paid. Or, he may retain the chattel and sue upon the contract for the damages resulting from the breach of warranty.

Greer v. Whalen. p. 280

2. Affirmation of quality.

Any affirmation of the quality or condition of the thing sold (not uttered as mere opinion or belief), made by the seller at

WARRANTIES—Continued.

the time of the sale, for the purpose of assuring the buyer of the truth of the fact affirmed, and inducing him to make the purchase, if so received and relied on by him, is an express warranty. *Greer v. Whalen.* p. 279

3. No express words.

To create an express warranty, the word "warranty" need not be used; nor is any precise form of expression required.

Greer v. Whalen. p. 279

WATER RIGHTS: PASTURE RIGHT FOR CATTLE; RESERVATIONS IN CONDEMNING—.

Quære: Whether, in condemning water rights, it is proper for the Mayor and City Council of Baltimore to reserve to the property owner the right of pasture and water cattle, in the remainder of the land, through which flowed the water it then condemned. *Brack v. Mayor, etc., of Baltimore.* p. 390

WILLS: CONSTRUCTION OF—. See **REMAINDERMEN.****WILLS: PROMISES TO REMEMBER IN—.****Evidence.**

Upon a trial of a caveat to a will, evidence had been offered and admitted without objection, that the testatrix knew that the witness had worked to pay for medical attendance, etc., for the witness' husband, who was an invalid, and the son of the testatrix, and that the testatrix had said that such payments "would all come back" to the witness; the witness was then asked what in round numbers was the total sum so paid; an objection to the question was sustained, and, on appeal, the ruling of the Court below was held to be correct.

Wagner v. Klein. p. 232

WITNESSES.**1. Unsworn evidence.**

Where the bookkeeper, who had made the entries in books whose contents were in issue, was available and could have been produced, but had not been called or examined, his unsworn statement as to the entries is not admissible.

Peoples v. Ault. p. 698

2. Rulings as to—; which are not reversible error.

The ruling of a trial court in refusing to allow certain questions to be asked a witness, does not constitute reversible error, when the testimony so sought to be adduced was elsewhere admitted without objection.

Baltimore Bridge Co. v. United Railways. p. 219

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